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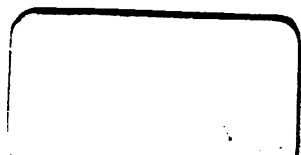
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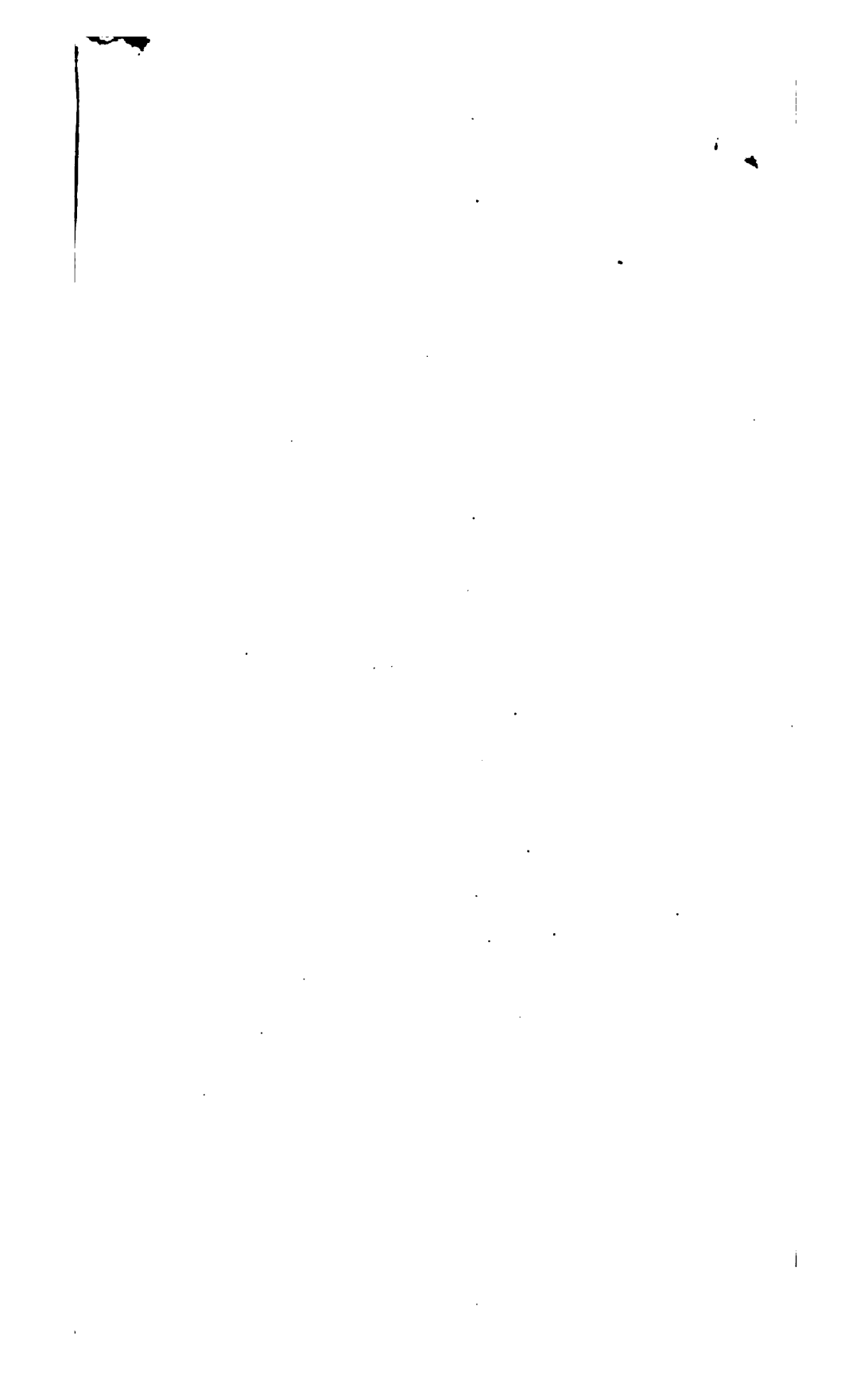
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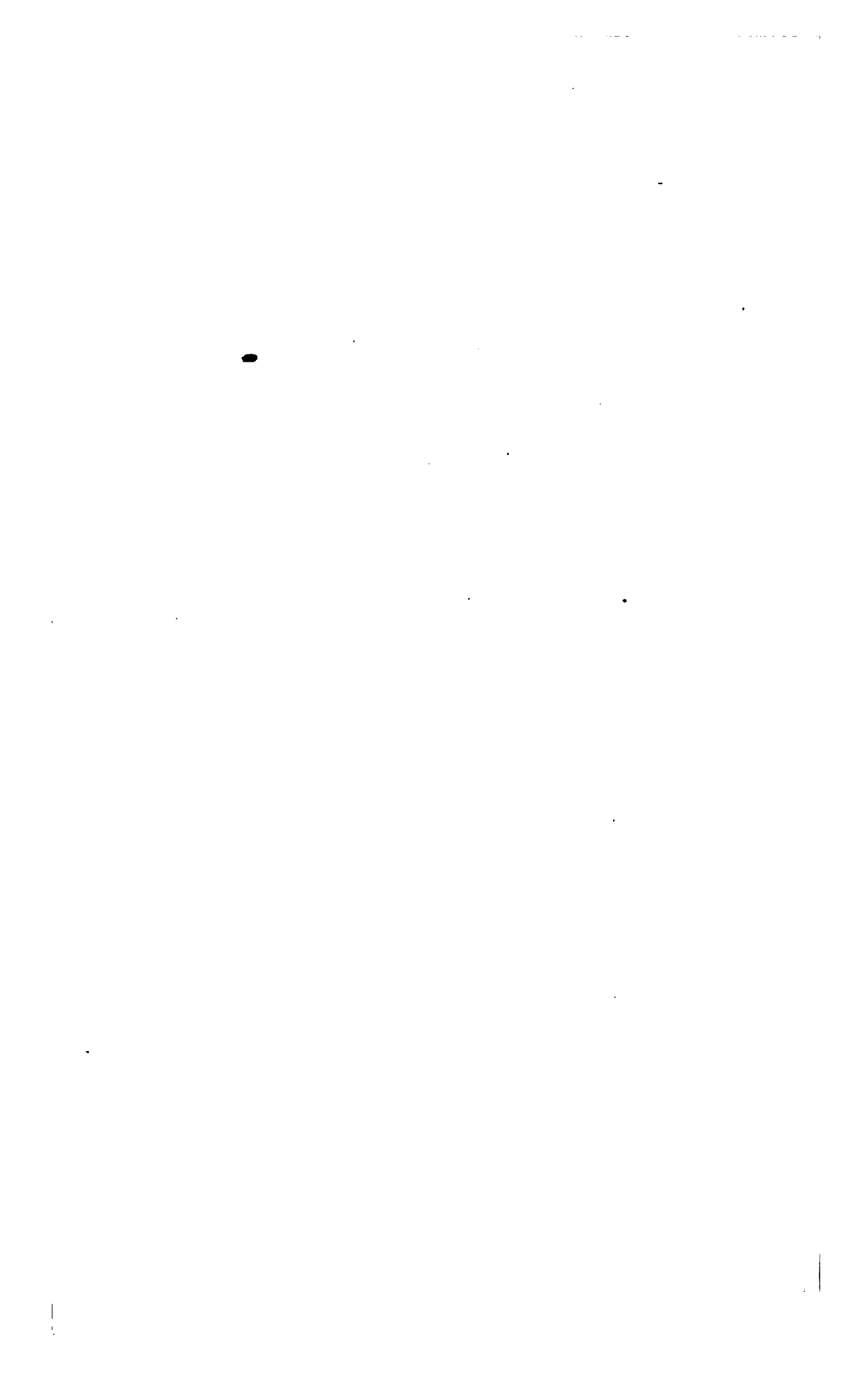


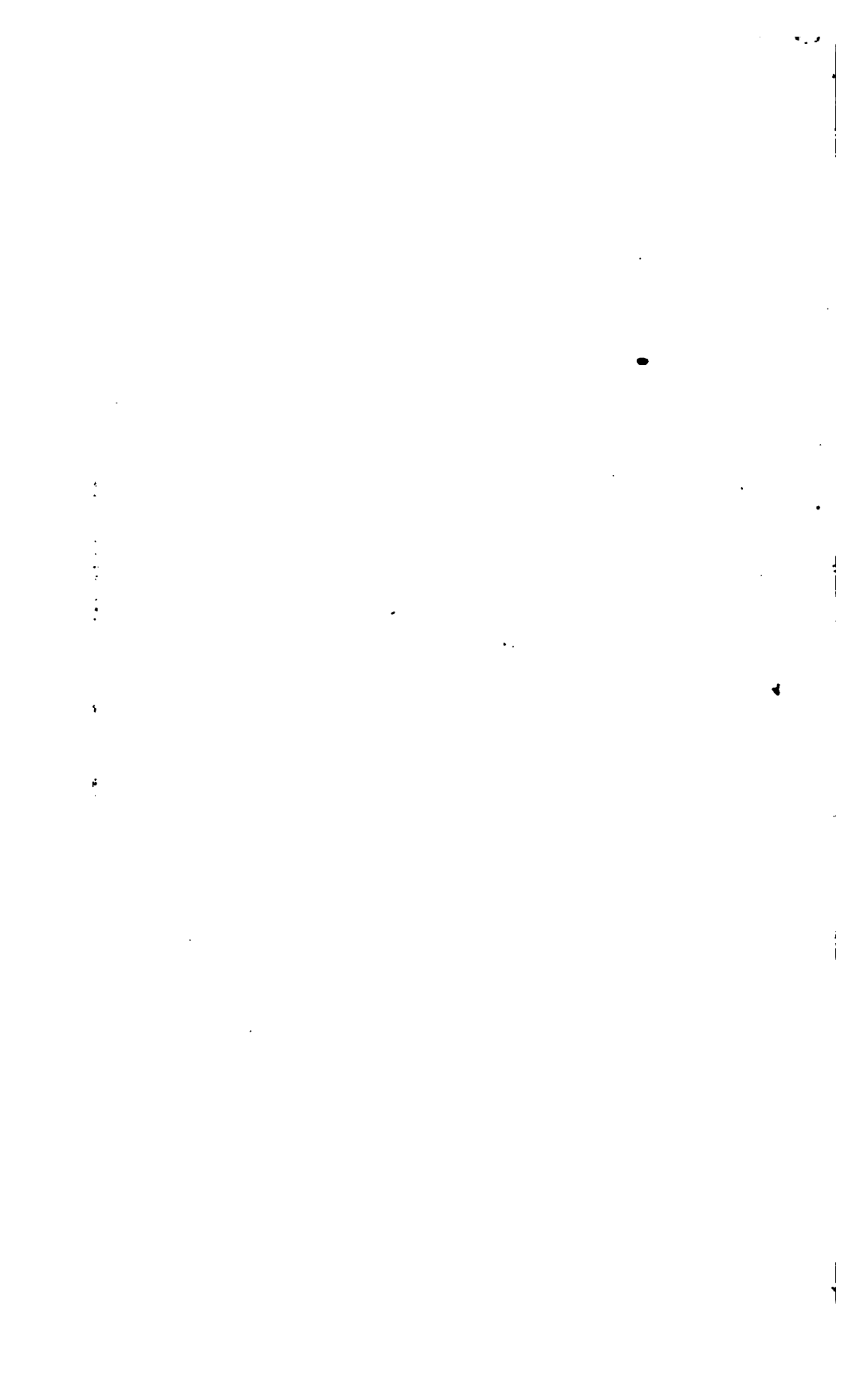
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THE
AMERICAN REPORTS:

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES.

WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON.

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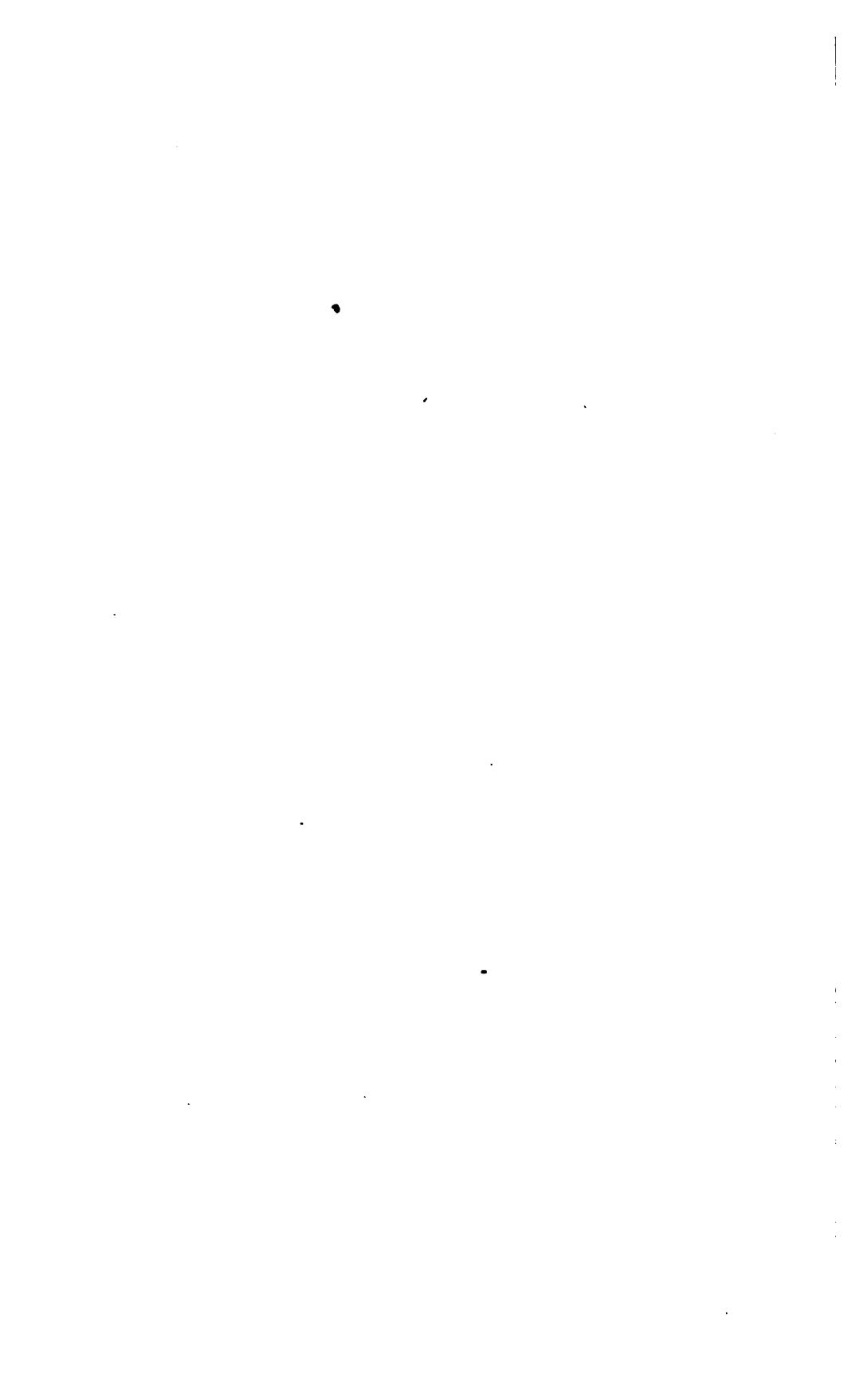
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CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

BROWN, Petitioner, v. RICE.

(81 Maine, 55.)

Criminal law — Sentence — Power of court to revise.

Where a prisoner has been convicted and sentenced, and duly committed in pursuance of the sentence, the power of the court to revise or change the sentence is at an end.

PETITION for writ of *habeas corpus*.

The petitioner having been indicted for cheating by false pretenses, and having pleaded guilty, was sentenced to imprisonment in the county jail for six months, and duly committed in pursuance of said sentence. Several days afterward the justice of the court which pronounced said sentence had the petitioner recalled into court, and sentenced him on the same indictment and conviction to be imprisoned in the state prison for the term of three years. The respondent, Rice, was the warden of the state prison.

Davis & Drummond, for petitioner.

N. Webb, for respondent.

KENT, J. The question presented by the case before us is, whether the sentence to three years' imprisonment in the state prior was legally imposed. It is not objected that such a sentence was beyond the limit fixed for the crime, but it is urged that the court had no power to inflict it, because the same court had passed a prior sentence of six months' imprisonment in the county jail on

the same indictment, and had issued a warrant of commitment, which had been executed by the sheriff, by committing the prisoner to the jail, and he had been received by the jailer and entered on the register as such prisoner, and had remained as such for nineteen days of the six months before he was recalled into court and the second sentence imposed.

After conviction, if no legal bar is interposed, it is the duty of the court to award sentence, and after such sentence of imprisonment is pronounced and recorded on the docket, it is the duty of the court to issue a warrant to the sheriff or warden, directing him to take the convict into custody, and remove him to the designated place of confinement. When the court has done these acts it would seem to have done all that it had legal power to do, and its power over the prisoner or his destiny, under the proceedings then before it, would appear to be at an end.

If there had been any irregularities or any illegal proceedings, the remedy would be by writ of error, or review, or by *habeas corpus*, or some other new proceeding.

It is clear that a judge cannot pass two sentences, to be in force at the same time. He cannot pass a sentence of imprisonment in the county jail for a specified time, and afterward add to it a sentence of years in the state prison, to take effect after the expiration of the first part of the sentence.

If there can be any validity in the second sentence, it must be because the first sentence is legally annulled or revoked, and made entirely void.

How far does the power of the court in this respect extend? It seems to have been settled by practice and by authority, both in this country and in England, that during the term the court has power over its unexecuted entries or judgments, and may revoke, alter or substitute new decrees or entries in place of those before made or entered and not executed, both in civil and criminal cases. If, for instance, a default is entered in a civil suit, and a special judgment is ordered and entered on a day before the end of the term, and also that execution issue accordingly, it seems that, before the execution is actually issued, the court may revoke and strike out the entry and leave the case without any special entry. But if an execution had been duly issued, and if a levy had been made or commenced, it would clearly be beyond the power of the judge to annul the record by ordering the clerk to erase the entry. So in a

Brown v. Rice.

criminal case, so long as the sentence remains entirely unexecuted in any part, and no execution of it has been attempted or made, it has been held that it might be revoked, and another sentence be substituted. *Commonwealth v. Weymouth*, 2 Allen, 144.

Chief Justice SHAW, in *Stickney v. Davis*, 17 Pick. 169, says, when speaking of a judgment in a civil case: "Where it clearly appears that no action has been had on the judgment, or the execution, if one has been issued, has been returned to the files unexecuted, and where the rights of third persons cannot be affected, there seems to be no reason why the same thing (as an entry of a judgment *nunc pro tunc*) should not be done by vacating the entry of judgment, and bringing the action forward. This ought to be done with great caution, and with strict regard to the rights of others."

These cases certainly are as strong for the respondent as any that can be found, and recognize the right of the court to go as far, at least, as we can find either reason or authority for going. But they stop at the point of execution, and clearly express or imply, that, after execution or warrant issued and executed, this power of summarily changing the record, or judgment, or sentence, is at an end.

In this case the warrant had issued, had been executed; the prisoner had been under sentence, and in prison, under the warrant, and had suffered nineteen days of confinement. This was a legal sentence, and was in process of execution, when, for some reason, doubtlessly one that the judge deemed sufficient, he was brought from the jail, and the former sentence was recalled and revoked and the new one imposed.

If these proceedings were legal, it would seem that this prisoner must suffer punishment under two distinct sentences for the same offense. If the judge could annul the first sentence as to its legality, afterward, he could not annul or restore the nineteen days of imprisonment suffered under it. If now he is to be sent to the state prison for three years more, not counting his time in jail under the first sentence, he certainly must suffer two distinct imprisonments under two distinct sentences, given at a considerable interval of time, for the same offense and under one indictment.

We think that the sentence in question to the state prison was illegally imposed, and is void and cannot be carried out. We think the first sentence was legal and should be executed.

of the disclosure of the real principal, as if the agent had been the contracting party."

In a note to the case of *Thomson v. Davenport*, found in 2 Smith's Leading Cases, 373, it is said: "Where the agent has contracted for an undisclosed principal, and that principal thinks proper to sue on the contract in his own name, he does so subject to those rights which the defendant might have exercised against the agent at the time of disclosure, had that agent been really a principal." Numerous cases are here cited in favor of the doctrine.

In *Kelley v. Munson*, 7 Mass. 319, SEWALL, J., in delivering the opinion of the court, says: "Where a factor sells in his own name, being responsible for the price of the goods sold, whether collected or not; or where he sells them to his own creditor where there are mutual dealings, the principal cannot interfere to the prejudice of the party dealing with the factor, without knowledge of his agency, and only the balance, if any be due to the factor, can be reclaimed by the principal."

In *Ilsley v. Merriam*, 7 Cush. 242, the court remarks: "The position taken by the defendant is that Field, the agent, having made the contract in his own name, the name of the principal not being disclosed, the defendant is entitled to be placed in the same situation in all respects as if Field had been the real party in interest. Is this a correct view of the law on this point? There is no doubt that the principal, who thus assumes a contract made by his agent, must take it subject to all the equities that would avail the defendant if the agent were the plaintiff; or, to state the principle in other language, the principal must take therewith all the attendant burdens and subject to all the attendant first counter-claims and defense of the other contracting party."

In the case of *Huntington v. Knox*, 7 Cush. 371, it is said: "It is now well settled by the authorities, that, when the property of one is sold by another as agent, if the principal give notice to the purchaser before payment to pay to himself, and not the agent, the purchaser is bound to pay the principal, subject to any equities of the purchaser against the agent."

Chancellor KENT says: "If, however, the factor should sell in his own name as owner, and not disclose his principal, and act ostensibly as the real and sole owner, the principal may, nevertheless, afterward bring his action upon the contract against the purchaser; but the latter, if he *bona fide* dealt with the factor as owner, will be

Traub v. Milliken.

entitled to set off any claim he may have against the factor, in answer to the demand of the principal." 2 Kent's Comm. 632.

In Smith's Mercantile Law, 140, it is said: "Thus when a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, the principal; and though the real principal may appear and bring an action on that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal."

In 1 Parsons on Contracts, 53, it is said: "In the case of a simple contract, an undisclosed principal may show that the apparent party was his agent, and may put himself in the place of his agent, but not so as to affect injuriously the rights of the other party."

In Chitty on Contracts, 225, it is said: "It would be unjust to permit the principal to interfere and sue the debtor to his prejudice, in those instances in which the debtor had innocently, and in ignorance of the claim of the principal, dealt with the agent, he being a factor, upon the supposition that he was the principal, a character which he was allowed by his employer to assume by having the possession of the goods, or being intrusted with the *indicia* of property therein. If, therefore, the defendant has credited and acquired a set-off against the agent under such circumstances, before the principal interposed, the latter will be affected and bound by the set-off in the same manner as the agent would be were he the plaintiff on the record."

In Story on Agency, section 419, it is said: "So if the agent has sold goods in his own name, no other person being known as principal, and the agent agrees, at the time of sale, that the vendee might set off against the price a debt due to him by the agent, that set-off will be as good against a suit brought by the principal as it would be if the suit was brought by the agent for the price."

"The principal is ordinarily entitled to the same remedies against such third persons, in respect to such acts and contracts, as if they were made or done with him personally; * * * it will make no difference that the agent may also be entitled to sue upon the contract, * * * nor that the third person has dealt with the agent, supposing him to be the sole principal. The only effect of the last consideration is, that the principal will not be permitted to intercept the rights of such third person in regard to the agent; but he must

take the contract subject to all equities, in the same way as if the agent were the sole principal. Thus, for example, if the agent is the only known or supposed principal, the person dealing with him will be entitled to the same right of set-off as if the agent were the true and only principal." § 420.

In Paley on Agency, by Lloyd, 325, it is said: "Moreover, if an agent be permitted to deal as if he were principal, the party dealing with him, and ignorant of his representative character, is entitled to the same rights against him as if he were in fact the principal. So that, under these circumstances, he may set off against the demand of the principal a debt due from the factor to himself."

We think the case at bar comes fully within the rule stated by the foregoing authorities. The report discloses no evidence that the defendants knew or had reason to believe that Robinson was acting in a representative character. Robinson says he did not communicate to them the fact that the plaintiffs owned the sugars. This fact is affirmatively stated and proved. In *Baxter v. Duren*, 29 Maine, 434, SHEPLEY, C. J., says: "When a person deals with a factor, knowing him to be the agent of some unknown person, the rights of the parties are governed by the rule which prevails when a person, not known to be an agent, deals with another as agent, without disclosing his principal."

Looking at the facts proved in this case, and applying to them these principles of law, we think the defendant is entitled to judgment.

It is quite clear that had the action been brought in the name of the agent Robinson, as it might have been done, the payment made by the defendants would have afforded a complete defense. There being no satisfactory proof that the defendants knew of his representative character, and it being proved that the agent did not disclose his principal, we think the plaintiffs cannot now come in and avoid the effect of that payment. If a set-off could be now allowed *a fortiori*, a payment made and accepted could be.

Whether being a foreign principal, beyond the seas, and their factor dealing as principal, they can or not sue at all in their own name, where the exclusive credit has been given the agent, we do not find it necessary to decide. It is sufficient for the disposition of this case to say, they cannot put themselves in a better position against these defendants than Robinson, the agent, would have been in had he commenced the action. *Judgment for the defendants.*

Corey v. Ripley.

COREY v. RIPLEY.

(57 Maine, 60.)

Bankruptcy. Impeaching discharge in state court.

A discharge in bankruptcy cannot be impeached in a state court for any cause which would have prevented the granting of the discharge under the bankrupt act, or would have been sufficient ground for annulling the discharge in the United States court under that act.

The authority to set aside and annul a discharge in bankruptcy under the act of 1867 rests exclusively in the United States courts.

The facts are stated in the opinion.

Shepley & Strout, for the plaintiff.

Davis & Drummond, for the defendant.

DICKERSON, J. Assumpsit on account annexed to the writ. The defendant pleaded a discharge in bankruptcy in bar of the further maintenance of this suit. The plaintiff alleged, in his replication, that the defendant's discharge is invalid, for the reason set forth in section 29 of the bankrupt act of 1867.

According to the agreement of the parties, the law court is to decide whether the defendant's discharge in bankruptcy can be impeached in this court for any cause which would have prevented the granting of the discharge under the bankrupt act, or would have been sufficient ground for annulling the discharge in the United States court, as provided in that act.

Section 29 of the bankrupt act of 1867 specifies the grounds which will prevent the granting of a discharge, or render one invalid when granted. After enacting that a discharge duly granted under this act shall be a full and complete bar on all suits, * * * and that the certificate of discharge shall be conclusive evidence of the fact and the regularity of such discharge, section 34 contains the following proviso: "Any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge, on the ground that it was fraudulently obtained, may, at any time within two years from the date thereof, apply to the court which granted it to set aside and annul the same."

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The question presented in this case did not arise under the bankrupt act of 1841, as that act made the bankrupt's discharge conclusive, "in all courts of justice" (§ 4), unless it should be impeached for one of the causes stated in the act itself, and no tribunal was designated for testing its validity. This provision of the act of 1841, however, was held to restrict the action of courts in impeaching the validity of the discharge of a bankrupt to the causes and the manner therein specified. *Chadwick v. Starrett*, 27 Maine, 138; *Coates v. Bush*, 1 Cush. 564; *Humphrey v. Swett*, 31 Maine, 192.

By parity of reasoning, the mode of impeaching the validity of a discharge prescribed in the act of 1867 excludes all other modes; and such, we think, is the true construction of that act. The proceedings in bankruptcy are statutory proceedings. The powers exercised and the remedies provided in bankruptcy are given by statute. The impeaching tribunal is specified, and this designation, according to well-established principles of interpretation, forms a part of the remedy, and excludes all others. *Dudley v. Mayhew*, 3 N. Y. 10; *Stevens v. Evans*, 2 Barr. 1157; *City of Boston v. Shaw*, 1 Met. 130.

The act of 1841 made the bankrupt's discharge "full and complete evidence of itself, in favor of such bankrupt * * * in all courts of justice, * * * unless the same should be impeached" for the causes and in the manner stated. That act, moreover, contains no such provision for determining the validity of a discharge in bankruptcy, as is provided in the act of 1867. The difference in the phraseology and the provisions of the two statutes is quite significant, and precludes the construction, so ingeniously contended for by the learned counsel for the plaintiff, that the same mode of testing the validity of the bankrupt's discharge obtains under both acts. Instead of subjecting the bankrupt to the liability of having the validity of his discharge called in question, in any and all suits that should be brought against him, on his debts proved or provable under the bankrupt act, for an indefinite time, the proviso in the 34th section of the act of 1867 was intended to limit all contestants to the period of two years from the date of the discharge, and to the tribunal therein specified, in respect to the time and mode of annulling his discharge. The act in effect says to all such, "You have had an opportunity to prove your claims and to show cause why your debtor should not receive his discharge in bankruptcy; you are allowed two years to impeach that discharge

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before the tribunal that granted it; at the expiration of that period you will have had your day in court, and must thereafter be forever silent," *interest reipublicæ est sit finis lititium*. There is but one way of impeaching a discharge in bankruptcy, under the bankrupt act of 1867, and that is the mode expressly provided for in the 34th section of that act. It is by no means improbable that the experience of contesting the validity of such discharges before the state courts taught congress the wisdom of restricting the jurisdiction over this subject to the federal courts.

But there are still more serious objections to the construction contended for by the plaintiff's counsel. The constitution of the United States confers upon congress the power to establish a uniform system of bankruptcy. This grant of powers carries with it jurisdiction over the person and property of the bankrupt, and authority to provide courts, and all other instrumentalities necessary and proper, to carry into effect the general purpose of a bankrupt law. The authority of congress over this subject being paramount to state authority, where it has provided a mode of dealing with a bankrupt's estate that mode only can be pursued, and it would be an infringement of the paramount law if state courts should adopt another and a different mode. The authority conferred by the bankrupt act of 1867 upon United States courts, to set aside and annul a discharge in bankruptcy, is incompatible with the exercise of the same power by a state court. If the validity of a discharge in bankruptcy may be impeached by a state court, this may be done, though such discharge had been declared valid in the mode provided in the bankrupt act; and the anomaly would be presented of a discharge recognized as valid by the courts of the United States and invalid by a state court. *Sturgess v. Crowningshield*, 4 Wheat. 196; *Stetson v. City of Bangor*, 56 Me. 286.

The distinction made by the counsel for the defendant, between actions brought before the debtor petitions to be admitted a bankrupt, and those brought afterward, is unsound. The authority of congress over the subject-matter is the same in both cases; and it has ever used that authority appropriately to reach that class of cases. In respect to the question at issue in the case at bar, the same principles govern in either case.

According to the agreement of the parties there must be—

Judgment for the defendant for his costs in the law court only.

White v. Republic Fire Insurance Company.

WHITE V. REPUBLIC FIRE INSURANCE COMPANY.

(57 Maine, 91.)

Liability of insurer for damage, etc., caused by removal of goods.

Where insured goods are removed from a building apparently in imminent danger of being destroyed by fire, the insurers are liable for the reasonable damage and expense of removal, although the building is not in fact burned.

THE facts are stated in the opinion.

H. W. Gage and S. C. Strout, for the plaintiff.

Davis & Drummond, for the defendants.

DICKERSON, J. Assumpsit on two policies of fire insurance, submitted on report.

On the night of the conflagration of July 4, 1866, at Portland, the plaintiff, apprehensive that the building known as Ware's block, on the northerly side of Federal street, the third story of which was occupied by him for the manufacture of brushes, would be destroyed by fire, removed his stock, consisting of bristles and manufactured brushes, and his tools, from the building. The block was not destroyed or injured by the fire; and the plaintiff brings this action to recover the damages thus done to his stock and tools, and for the expense incurred in removing them.

The important and interesting question is raised, whether the plaintiff's loss is covered by the policy. In general, the assured is entitled to indemnity, unless the loss happens from the qualities or defects of the subject insured, his own fault, or some peril for which he is answerable. 1 Phillips on Ins. 639.

It is argued by the learned counsel for the defendants, that this is not a loss by fire; that fire was not the proximate cause of the damage; and that therefore the loss is not covered by the policy. While it has been held that a loss by lightning without combustion is not a loss by fire, it has also been held that the loss of a building by being blown up by gunpowder, and demolished to stop a conflagration, is within the terms of a fire policy. *Babcock v. Montgomery Co. Mut. Ins. Co.*, 6 Barb. 637; *Keniston v. Merrimack Co. Mut. Ins. Co.*, 14 N. H. 341; *City Ins. Co. v. Corties*, 21 Wend. 367.

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Damage done to goods by having water thrown upon them in extinguishing a fire, and a loss of goods by theft after they have been removed from a fire, are covered by the policy. *Hillier v. Alleghany Ins. Co.*, 3 Penn. 470; *Witherell v. Maine Ins. Co.*, 49 Me. 200.

A bolt may be loosened, or a timber started, in a storm, without causing any loss until the subsequent action of the water or climate, or the greater strain of a different cargo has so augmented the injury, as to cause the loss of the vessel; and yet such a loss is a loss by the storm. *Stephenson v. Piscataquis Ins. Co.*, 54 Me. 76.

So if, after a storm has subsided, the boat is lost by reason of the disabled condition of the ship, in consequence of damage done during the storm, it is a loss by the storm. *Potter v. Ocean Ins. Co.*, 3 Sum. 27.

In these and like cases the direct proximate cause of the damage or loss is not to be found in the fire, or the storm, but in the water, the removal of the goods, the action of the climate, or strain of the cargo, or the disabled state of the ship. If courts were required to hold that no loss is caused by a policy of insurance unless the peril insured against is directly operating upon the subject insured at the time of the ultimate catastrophe, they would deny the right to recover in many cases where it has long been recognized by courts of the highest authority. The legal maxim, *causa proxima spectatur*, is by no means of unusual application in its strict technical sense.

If a loss from demolishing a building with gunpowder to stay the progress of a conflagration comes within the terms of a fire policy, ought not the damages and expense of removing such building to be recoverable, if the object in view could be as speedily and successfully accomplished?

In such cases is not the fire, the impending conflagration, the existing operating cause alike of the destruction of the building or of its removal from danger? Is the assured entitled to recover damages for one of the effects of the same procuring cause, and not for the other? If, by reason of the immobility of real estate and the necessity of speedy action on such occasions, it becomes necessary to demolish a building, at the cost of the underwriters, to prevent it and other property from being destroyed by fire, does not the analogy of the law require that they should also be chargeable for the damage and expense of saving personal property from destruc-

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tion by removing it to a place of safety? Is not the producing cause of both results the same?

So if the underwriters are liable for damage done to goods by having water thrown upon the building in which they are stored, to extinguish the fire, ought they not, also, to be liable for damage done to goods, in time of imminent peril, by throwing water upon the building containing them to prevent it and them from destruction, though actual ignition has not taken place? In both cases, technically speaking, the water and not the fire is the direct proximate cause of the damage. It is neither the policy of the law nor public policy to make it for the interest of the assured, in case of fire, to postpone the use of the means for extinguishing the fire, and the removal of the goods, until the building containing them is actually on fire. In many, if not most, cases, such delay would be tantamount to consigning both goods and building to destruction. Would the interests of insurance companies or the public morals be subserved by the establishment of such a policy?

The question presented is one of considerable difficulty, and one upon which the authorities are at variance. While the supreme court of Illinois, in a case like the one at bar, have held that the underwriters are liable for the damage to the goods and the expense of removing them, the court in Pennsylvania have denied them liability. *Case v. Hartford Ins. Co.*, 13 Ill. 676; *Hillier v. Alleghany Ins. Co.*, 3 Penn. 470. We think the liability of the underwriters, in these and similar cases, depends very much upon the imminence of the peril, and the reasonableness of the means used to effect the removal. The necessity for removal is analogous to the necessity that justifies the sale of a disabled vessel, by the water. It is not to be determined by the result alone, but by all the circumstances existing at the time of the fire. The necessity for removal need not be actual, that is, the building may not have been actually burned, since this may have been prevented by a change in the direction or force of the wind, the more skillful or efficient management of the fire engines, or the sudden happening of a shower, or a like unforeseen event. But the imminence of the peril must be apparent, and such as would prompt a prudent uninsured person to remove the goods; it must be such as to inspire a conviction that to refrain from removing the goods would be the violation of a manifest moral duty; the damage and expense of removal, too, must be such as

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might reasonably be incurred under the circumstances of the occasion. Angel on Fire Ins., § 117.

When such a case exists, we think it the better opinion to hold that the underwriters are chargeable for the damage and expense of removing the goods, as this result seems most in accordance with reason, the analogies of the law, and public policy. Such, also, is the conclusion of Mr. Phillips, the learned commentator on the law of insurance. "It seems," he says, "to be the better doctrine, and the one most closely analogous to the jurisprudence on the subject of insurance generally, that the underwriters are liable for such damage and expense, reasonably and expediently incurred, as being directly occasioned by the peril insured against." 1 Phillips' Ins. 645, 646.

The doctrine we maintain on this subject is applicable to a large class of cases, recognized by the law of insurance, and is found in that well-established principle of the law of insurance, that insurance against, or an exception of a peril, besides the consequences immediately following it, may include, also, a loss or expense arising on account of it, although what is insured against, or excepted, does not actually occur, provided the peril insured against, or excepted, is the efficient acting or imminent cause or occasion of the loss or expense. 1 Phillips' Ins., § 1131.

The proximity of the fire to the building occupied by the plaintiff, its rapid progress, terrible intensity and fearful ravages, leave no reason to doubt but the goods were removed through a reasonable apprehension that they would be destroyed by fire if suffered to remain. Their situation, too, in the third story, requiring earlier attention, rendered their condition more hazardous than if they had been on the first floor. A prudent uninsured person could scarcely have omitted the precaution taken by the plaintiff.

In removing the goods the plaintiff was bound to exercise that reasonable degree of care which was suited to the circumstances of the occasion; and, when we consider the situation of the goods, the imminence of the peril, and the terror and consternation naturally excited by the progress and fury of the conflagration, we are not prepared to say that he did not exercise such care.

Under the rule for apportioning the damages between the two defendant companies, agreed upon by the parties, if the court should find that the plaintiff is entitled to recover, the plaintiff is to have judgment against the Relief Insurance company for the sum of one

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thousand two hundred and twenty-nine dollars and seventy-six cents, and interest from the date of the writ; and also against the Republic Insurance company for six hundred and seventy-three dollars and sixty-eight cents, and interest from date of the writ.

Judgment so ordered.

WILSON V. GRAND TRUNK RAILWAY.

(57 Maine, 128.)

Carriers — Liability for baggage received for transportation.

The plaintiff was a passenger on defendants' road, but had lost her trunk while traveling over a connecting road. A few days after a conductor on the connecting road found the trunk and left it in charge of the defendants' baggage master, stating the facts, and requesting him to forward it to plaintiff, which he agreed to do. Nothing was said about freight, nor whether the trunk should go by the freight or passenger train. The trunk being lost, *held*, that the defendants were liable for its value.

THE facts appear in the opinion.

Shepley & Strout, for the plaintiff.

P. Barnes, for the defendant.

APPLETON, C. J. This is an action against the defendant corporation as common carriers, for neglecting to carry the plaintiff's trunk and deliver the same, according to contract. The writ is in the usual form. There is no motion for a new trial. We cannot, therefore, consider the question whether the verdict is against evidence, the defendants not having seen fit to present it. The exceptions taken at the trial only are before us.

The plaintiff was a passenger on board the defendants' cars. Her trunk had been lost while traveling over the Portland and Kennebec railroad. Some two or three days after she had passed over the defendants' railroad, the conductor on the Portland and Kennebec road found the trunk and left it in charge of the defendants' baggage master — on their platform — informing him that the plaintiff had passed over the defendants' railroad two or three days before,

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and requested him to take charge of the same and deliver it at the Empire station, on their line, which he promised to do. Nothing was said about freight, nor whether the trunk should go by the passenger or the freight train. The trunk was lost, and this suit is brought to recover its value.

The plaintiff traveled over the defendants' railroad without her trunk. She had no right to require it to be carried subsequently without compensation as the baggage of a passenger. The defendants were under no obligation so to carry it. They were in no way responsible for its loss originally. *Wilson v. G. T. Railway Co.*, 56 Me. 60.

The plaintiff was liable for freight, and the defendants had a right to claim it. It was not necessary for the plaintiff to tender it to render the defendants liable, unless prepayment was demanded.

It is objected that no checks were given, and that the action of the baggage master was in violation of the rules and regulations of the corporation. These regulations are not before us. It is said they were before the court at a former trial, but that cannot avail the defendants in the present case. However stringent they may be, we cannot give effect to them unless they are offered in evidence. If reliance was placed upon them, they should have been introduced and made part of the case.

The defendant requested the presiding judge to instruct the jury "that, upon the whole evidence, the plaintiff is not entitled to recover, and their verdict should be for the defendants." This instruction was refused, and the jury were instructed that, if the testimony satisfied them "of the fact that this trunk was taken into possession of the baggage master of the defendants' road, at Yarmouth Junction, he having authority to receive it in behalf of the company, and he did receive it and promised in behalf of the company that the company should carry it safely for this plaintiff and deliver it to her at the Empire station, and the trunk, being so received, has not been so carried, but was lost, and on suitable demand therefor, it has not been delivered to her, and that without a claim for freight on it, or any pretense of withholding it for payment of freight, * * * the plaintiff is entitled to recover the value of the trunk and its contents."

The trunk was delivered in the custody of the defendants' agent for transportation. It was accepted by him for that purpose. Nothing was said as to the freight or transportation. But the law

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imposes the obligation to pay. It was left in the custody of the defendants and with their agent for transportation. Neither the plaintiff nor the conductor of the Kennebec and Portland railroad assumed to give directions as to the time or mode, but left the whole to the defendants. In *Mayall v. Boston & Maine Railroad*, 19 N. H. 122, it was held, that when the corporation have a general agent, who is employed by them for the express purpose of recovering and transporting merchandise for him, and is held out to the world as invested with authority for this purpose, if goods are delivered to him, to be transported in the way of his duty, the corporation will be liable for the manner in which that duty is performed, and the contract of bailment may be regarded as made by them.

The cases cited by the learned counsel for the defendants are not at variance with these views. In *Elkins v. Boston & Maine Railroad*, 23 N. H. 287, GILCHRIST, C. J., says: "The articles were such as are usually carried as personal baggage. They were not accompanied by the owner, and, by the printed rule on which the defendants rely and by the practice, no agent was authorized to send them by the express train." But the printed rules of the corporation, whatever would be their effect, are not before us. In *Collins v. Boston & Maine Railroad*, 10 Cush. 507, the plaintiff sent by a passenger train a quantity of merchandise, expecting to go with it, but did not. The goods were lost without any gross negligence in the carrier or any conversion by him. *Held*, the carrier was not liable. But DEWEY, J., in delivering the opinion of the court, uses the following language: "To avoid all misapprehension as to other cases, it may be, however, proper to remark, that in this opinion we have reference to the cases where boxes of goods, bales of merchandise, or the like, are, for a compensation to be paid, though received by carriers of persons for transportation by passenger trains, being known and understood not to be baggage. Such carriers may contract for carrying merchandise on these trains, and whenever they do so, they do it with the ordinary liability of carriers of merchandise."

A "passenger's baggage," says the court in this case (56 Maine, 60), "subsequently forwarded by his direction, in the absence of any special agreement with the carrier, or negligence on his part, is liable, like any article of merchandise, to the payment of the usual freight." The same view of the law was taken by NELSON, J., in the *Elvira Harbeck*, 2 Blatchford, 339, a case similar to the one at bar,

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in which he says: "In cases where the passenger accompanies his baggage, the fare charged for his passage includes compensation for its transportation, and the carrier becomes responsible for its safe delivery. If the passenger does not accompany it, the carrier may claim compensation in advance, or may postpone his claim till the delivery, and rely on his lien or on the personal responsibility of the owner. I do not see why the rule of responsibility for the safe keeping should not be the same in both cases; the actual payment of the freight in one case, and the actual liability and lien for its payment in the other, constitute the consideration for the undertaking."

The instruction given was correct, and the one requested and withheld was rightly refused.

The delivery of a trunk into the hands of the defendants' agent, and the reception of the same by him for transportation, imposes upon the corporation the obligation of common carriers. It is like the delivery of any parcel for freight. The law imposes the obligation to pay on the part of the owner, and to safely carry and deliver on the part of the carrier. There is no evidence that the plaintiff claimed it should be carried without compensation as passenger's baggage, or that the defendants agreed so to transfer it. It mattered not whether it was a trunk or a barrel of flour. It was received to be safely carried. It was known to be the trunk of a passenger who had previously passed over the road.

The objection that there was a variance between the writ and the proof is without foundation. The evidence fails to show there was any special delivery of the trunk to be carried as passenger baggage and without compensation. The plaintiff was not there, and could not, therefore, make such claim. The conductor of the Kennebec and Portland Railroad merely stated the facts and left the trunk with the defendants' agent to be carried on such of their trains as they might elect, and for such compensation as the law might determine.

Exceptions overruled.

Colley v. Inhabitants of Westbrook.

COLLEY V. INHABITANTS OF WESTBROOK, appellants.

(57 Maine, 181.)

Highway — Notice of defect in.

In an action against a town to recover for injuries caused by a defect in a highway, the question whether notice to the town of the existence of the defect can be inferred from the length of time it has continued, is a question for the jury.

ACTION on the case for an injury caused by a defect in a highway, on the evening of December 24, 1868. At the trial the judge charged the jury, *inter alia*, as follows: "If you find that the defect which occasioned the injury was open and visible during the whole month of November, I instruct you that that fact is sufficient notice, even though actual notice to the town is not proved." To this instruction exception was duly taken.

N. Webb, for defendant.

Shepley & Strout, for plaintiff.

APPLETON, C. J. This is an action on the case against the defendant town for an injury occasioned by a defect in a highway, which they were bound to keep in repair.

To entitle the plaintiff to recover, notice to the town of the defect must be proved. It may be proved directly or inferentially. It may be proved by actual notice to one of the inhabitants, or facts and circumstances may be shown from which notice may be inferred. But the inference is not of law, but of fact. It is one for the jury to draw.

The presiding justice instructed the jury, that, if they found that the defect which occasioned the injury was open and visible during the whole month of November, that fact was sufficient notice, though actual notice was not proved; and that, if they found a legal defect, and that it was open and visible during the whole month of November, that fact constituted sufficient notice.

There is no rule of law prescribing for what length of time the continuance of a defect shall constitute notice of its existence. There is no presumption of law on the subject. Whether there

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was a defect, the length of time it had continued, and whether, from its continuance, notice to the town of its existence could be inferred, were alike questions to be determined by the jury, and not by the court. The ruling of the presiding justice was erroneous, in withdrawing from the jury one of the very questions which it was their province to determine, and in determining it for them, instead of submitting it to their decision.

Exceptions sustained.

NEW ENGLAND EXPRESS COMPANY V. MAINE CENTRAL RAILROAD COMPANY.

(87 Maine, 188.)

Carriers—Duty to carry all freight without preference.

The defendants contracted with the Eastern Express Company to give the latter a certain share in the baggage and mail car attached to passenger trains for the carriage of their goods, and agreed not to let any similar space in any car attached to passenger trains to any other persons or express carriers during the continuance of the contract. Plaintiffs, another express company, offered packages to be transported on defendants' passenger trains, which the defendants refused to receive or transport. *Held*, that defendants were liable to plaintiffs for such refusal.

ACTION on the case to recover damages for a refusal by defendants to carry plaintiffs' express freight from Bangor to Portland in one of their passenger trains.

The facts appear in the opinion.

W. L. Putnam, for plaintiff.

Davis & Drummond, for the defendant.

APPLETON, C. J. On the first of January, 1865, the defendant corporation contracted with the Eastern Express Company to give them a certain specified space in the car attached to the passenger train, and "devoted to the carriage of the United States mail and the baggage of passengers transported upon said passenger trains," and to transport the agents and the property they may carry on cer-

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tain conditions; especially agreeing that they would not "grant or let any similar space in any car or cars attached to the passenger trains, or run with them upon the defendant road, to any other persons as express carriers during the continuance of that contract," and until its termination, December 31, 1869.

The plaintiffs, a corporation duly organized, and similar in its objects to the Eastern Express Company, made application to the defendants for privileges or rights similar to those granted said company, and on August 27, 1865, "after seasonable notice of their intentions, offered at Bangor packages and other property such as is usually carried by express companies, to the proper persons in charge of the passenger trains upon the defendant's road, and at the time and place when and where the Eastern Express Company load their freight, to be transported upon said road in their passenger train, and were ready to pay or secure the payment of a reasonable sum for such service and to comply with all usual and reasonable terms applicable to the transportation of express matter, and the defendants refused to receive and transport said parcels and property upon said passenger train," though they were transporting express matter for the Eastern Express Company, on their passenger train at that time.

It is admitted that the defendants are common carriers of passengers and merchandise. It is obvious that the contract with the Eastern Express Company is one conferring upon it a monopoly.

Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply. For similar equal services they are entitled to the same compensation. All applying have an equal right to be transported, or to have their freight transported, in the order of their application. They cannot legally give undue and unjust preferences, or make unequal and extravagant charges. Having the means of transportation, they are liable to an action if they refuse to carry freight or passengers without just ground for such refusal.

The proprietors of a stage-coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they have room, and there is no legal excuse for a refusal. And it is not a lawful excuse, that they run their coach in connection with another coach which extends the line to a certain place, and have agreed with the proprietor of such other

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coach not to receive passengers who come from that place on certain days, unless they come in his coach. *Bennett v. Dutton*, 10 M. H. 481.

It is true, that by the rules and regulations adopted by the directors of the defendant corporation, passengers and their baggage only (except the United States mail) are to be transported in passenger trains, and merchandise is to be transported in merchandise trains. No one can complain of these rules if adhered to. They are entirely unobjectionable. The complaint is of their continual violation, or rather of the interposition of a special and exceptional rule in the shape of a contract, by which they agree to carry the baggage of the Eastern Express Company, and contract not to take that of any other express company. If they can carry for one company and refuse to carry for another, they may equally and as well justify the carrying of A., and the refusal to carry B., both being unobjectionable as passengers, being ready to comply with all their requirements, and they having ample space for the accommodation of both.

The defendants cannot escape their common-law liabilities or avoid the performance of their duties to the public by fencing off a part of a car for the Eastern Express Company. They none the less carry the merchandise, though apart by itself. If this was for the purpose of mutual convenience, it would not increase nor diminish the duties or liabilities of a common carrier. If it was for the purpose of evasion, and to enable them thus evasively to give unjust preferences, the court will long hesitate before it will give effect to shifts and evasions for the sole purpose of eluding the law.

The charter of the Androscoggin and Kennebec Railroad Company was approved March 28, 1845; that of the Penobscot and Kennebec Railroad Company, April 7, 1845. The act authorizing their consolidation was approved April 1, 1856, and the defendant corporation, composed of the above railroad companies, was duly organized September 24, 1862. By the act of consolidation the new corporation is made subject to the liabilities, and is obliged to perform the duties, of the two corporations of which it is the consolidation.

By section 6 of the charter of each of the original corporations, "A toll is hereby granted and established for the sole benefit of said corporation, upon all passengers and property of all descriptions, which may be conveyed or transported from time to time by the directors of said corporation. The transportation of persons and

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property * * the weights of loads, and all other matters and things in relation to said roads, shall be in conformity with such rules, regulations and provisions as the directors shall from time to time prescribe and direct."

A toll is granted. But a toll implies uniformity of compensation for equality of service. It is for the sole benefit of the corporation, and not to enable the corporation to give discriminating preferences. It is to be upon "all passengers and property of all descriptions," thus negating the right to confer special favors on one or more, or to refuse to some what has been granted to others similarly situated. All passengers and property, upon tendering the established toll, have a right to the services for which it is the prescribed compensation. It is true, the directors may establish rules and regulations. But rules and regulations imply uniformity of action in relation to the subject-matter to which they apply, not the right to give exclusive and peculiar privileges to some, which are denied to others.

So by section 12 of the charter of the original corporations, they each, "after they shall commence receiving tolls, shall be bound at all times to have said railroad in good repair, and a sufficient number of suitable engines, carriages and vehicles, for the transportation of persons and articles, and be obliged to receive, at all proper times and places, and convey the same, when the appropriate tolls shall be paid and tendered." The language is most general. The right to prefer and discriminate, and by discrimination to benefit one and ruin another, is not given. When "the appropriate tolls are paid, or tendered," the corporation is obliged to receive and convey, not whomsoever or whatsoever they may choose, but "persons and property" indifferently, coming within the prerequisite of the payment or tender of "appropriate tolls, and within just, impartial and uniform rules, which alone the corporations were authorized to make.

The very definition of a common carrier excludes the idea of the right to grant monopolies, or to give special and unequal preferences. It implies indifference as to whom they may serve, and an equal readiness to serve all who may apply, and in the order of their application. The defendants derive their chartered right from the state. They owe an equal duty to each citizen. They are allowed to impose a toll, but it is not to be so imposed as specially to benefit one and injure another. They cannot, having the means of transporting all, select, from those who may apply, some whom they

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will, and reject others whom they can, but will not, carry. They cannot rightfully confer a monopoly upon individuals or corporations. They were created for no such purpose. They may regulate transportation, but the right to regulate gives no authority to refuse, without cause, to transport certain individuals and their baggage or goods, and to grant exclusive privileges of transportation to others. The state gave them a charter for no such purpose.

Such is the common law on the subject. The legislation of the state has been in accordance with and in confirmation of these views.

By chapter 193, section 1, approved February 29, 1868, "all expressmen and all persons engaged in express business shall have reasonable and equal terms, facilities and accommodations, for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon any railroad owned and operated within the state, and for the use of the depot and other buildings and grounds of such corporation, and at any point of intersection of two railroads, reasonable and equal terms and facilities of interchange."

The defendants cannot object to this statute, unless they had, before its passage, an unlimited right to impose unreasonable and unequal terms, to give special privileges, to confer monopolies, selecting from the great public, from whom they acquired their powers and franchise, who shall be the special and selected objects of their bounty, and who shall not. The wildest and most extravagant supporter of vested rights will hardly claim this. It would imply madness or crime on the part of a legislature granting such rights. If, then, the defendants have no such right, the grant of a monopoly to one corporation at the expense of the general public is alike a violation of the common as of the statute law, and cannot be upheld.

The plaintiffs were willing and offered to pay reasonable freight for the services demanded, and to comply with all just and reasonable rules and regulations the defendants had or might establish; but the defendants refused to receive and transport the freight offered, in accordance with the plaintiffs' request.

The defense is, not that there was want of room or inability to transport the plaintiffs' freight as desired; or that the accommodation granted the Eastern Express Company was exceptional, granted only on a special occasion, or urgent necessity, and afforded only to

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meet such accident or to supply such necessity; but it is that they may lawfully select one individual or corporation upon whom they may confer exclusive and valuable privileges to the exclusion and injury of the rest of the community.

It is argued that the contract between the defendant corporation and the Eastern Express Company, it being made before the passage of the act of 1868, is a bar to the plaintiffs' right to recover. But such cannot be the case, unless the defendants had the right to grant "terms, facilities and accommodations" unreasonable and unequal as between the different express companies desiring the transportation of their goods, merchandise, etc., over their railroad. But this cannot be claimed. Further, if such a contract were to be held an answer to the plaintiffs' claim, on the ground that the legislature had no right to impair its validity, then it would follow, that they might be ousted of their control and jurisdiction during the whole existence of the defendant corporation; for the defendants might have made their contract co-extensive in time with their corporate existence.

Provisions similar to those of 1868 exist in England, and the courts have ever held all acts of undue preference void, while they have sustained the railroad corporations, when they have only the interests of the proprietors and the legitimate increase of the profits of the railway in view. It is not a legitimate ground for giving preference to one of the customers of a railway company, that he engages to employ other lines of the company for the carriage of traffic distant from, and unconnected with, the goods in question; and it is undue and unreasonable to charge more or less for the same service, according as the customer of a railway thinks proper or not to bind himself to employ the company on other and totally distinct business. *In re Bazendale v. The G. W. R. R. Co.*, 94 E. C. L. 308. But in that case a difference of charge was sustained upon goods from and to the same places, between persons who sent large quantities at a time, and stipulated to send given large quantities every year, and others who declined to do so. "The advantages there stipulated for and by the company," observes WILLES, J., "related to the carriage of the goods upon the same line, and directly affected the rate at which they could be profitably carried. In fact those advantages made a difference similar to that between the selling of goods wholesale and retail, the profit of carrying goods in large quantities and at the less rate at which they were carried,

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equaling or exceeding the profit upon the goods sent in smaller quantities at the greater rate at which they were carried." *In re Garton v. Bristol & Exeter R. R. Co.*, 95 E. C. L. 655, WILLES, J., says: "As to the third branch of the case, viz.: that a lower charge is made by the company to persons residing at Bridgewater for the carriage of goods than is made to the complainants, no satisfactory reason seems to me to have been given for that reduction. It is not shown that it is rendered necessary for the purpose of meeting and overcoming competition. * * The inequality of charge cannot be without a reason; and I am at a loss to see any other possible reason than a desire on the part of the defendants to displace the complainants as carriers, so that they themselves may become the sole carriers on their line of railway." Where a statute requires a railway company to carry for all who may apply and upon equal terms, they have no right to impose increased prices upon express carriers who sent freight by the company's trains, in aggregate quantities made up of small parcels directed to different individuals. *Pickford v. Grand Junction Railway*, 10 M. & W. 399. Much less have they a right to carry for one express company and refuse to carry for another, when they have the ability to carry for both.

In *In re Marriott v. The London & South-western Railway Co.*, 87 E. C. L. 498, the defendant railway company made arrangements at one of their stations with A., the proprietor of an omnibus running between the station and K., to provide omnibus accommodations for all passengers by their trains to and from K., and allowed A. the exclusive privilege of driving his vehicle into the station-yard for the purpose of taking up and setting down passengers at the door of the booking-office. "I am of opinion," observes COCKBURN, C. J., "that in giving an undue and unreasonable preference to and in favor of Williams brings the company within the provisions of the statute in question. 18 Vict. c. 31, § 2. I see no reason why this preference should be given to one omnibus and to the exclusion of another. * * * I therefore think the rule should be made absolute, to the extent of enjoining the company to admit the complainant's omnibus into the station of this railway at all reasonable times, for the purpose of receiving and setting down passengers and goods, in the same manner, and to the same extent, as other public vehicles of a similar description are admitted into the yard for that purpose." In *Piddington v. S. E. Railway Co.*, 94 E. C. L.

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109, the defendants made an increased charge upon "packed parcels." The jury negatived that they incurred an additional risk or expense on the carriage thereof. "Here," remarks BYLES, J., "the defendants charge double for certain packages, though the goods are of a like description, and the jury have found there is no increased risk or expense incurred by them in the carriage of them. That seems to me to be an express violation of the 17th section." In *Sanford v. Railway Co.*, 24 Penn. 378, it was held that express companies had as good a right to the benefits of a railroad as the owners of the packages which they carried personally had, and that a contract giving to an express company an exclusive right of transportation on the passenger trains was illegal and void, both at common law and by the statutes of the state. "Whenever," observes LEWIS, C. J., "a charter is granted for the purpose of constructing a railroad, the corporation is clothed with the power to take private property, in order to carry out the object, it is an inference of law from the extent of the power conferred, and the subject-matter of the grant, that the road is for the public accommodation. The right to take tolls is the compensation to be received for the benefits conferred. If the public are entitled to these advantages, it results from the nature of the right that the benefits should be extended to all alike, and that no special privileges should be granted to one man or set of men, and denied to others. The special stipulations inserted in charters, for the purpose of securing these rights, are placed there in abundance of caution, and affirm nothing more than the common right to equal justice, which exists independent of such provisions. * * * The supposed necessity for such provisions, in charters granted in this country and in England, proves nothing more than that the law-makers in both countries were aware of the difficulty in holding large corporations to those common obligations of justice which individuals feel bound to acknowledge without legislative enactment."

The plaintiff is entitled to maintain his action.

Defendant defaulted. Damages to be assessed by the judge at nisi prius.

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GODDARD V. GRAND TRUNK RAILWAY CO., appellants.

(57 Maine, 202.)

Carriers — Liability of, for willful misconduct of servants — Measure of damage.

The plaintiff, a passenger in defendants' railway car, gave up his ticket to a brakeman, who was authorized to demand and receive it. Shortly after the latter approached plaintiff, denied that he had received his ticket, and assaulted and grossly insulted him. In an action against the railway company to recover damages, — *Held*, that the defendants were liable, and that plaintiff could recover exemplary damages. (TABLEY, J., dissented on the question of damages.)

The defendants having retained the brakeman in their employ after notice of his conduct, the court refused to set aside as excessive a verdict for \$4,850.

THE action was trespass for an assault by defendant's servant upon plaintiff. The court at the trial charged, in substance, that if the facts sworn to by plaintiff were found to be true, the defendant was liable, and that it was a proper case for punitive or exemplary damages. The jury returned a verdict of \$4,850. The other facts are stated in the opinion.

G. F. Shepley, for plaintiff.

P. Barnes, for defendant.

WALTON, J. Two questions are presented for our consideration: first, is the common carrier of passengers responsible for the willful misconduct of his servant; or, in other words, if a passenger, who has done nothing to forfeit his right to civil treatment, is assaulted and grossly insulted by one of the carrier's servants, can he look to the carrier for redress? and, secondly, if he can, what is the measure of relief which the law secures to him? These are questions that deeply concern, not only the numerous railroad and steamboat companies engaged in the transportation of passengers, but also the whole traveling public; and we have endeavored to give them that consideration which their great importance has seemed to us to demand.

I. Of the carrier's liability. It appears in evidence, that the plaintiff was a passenger in the defendants' railway car; that, on

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request, he surrendered his ticket to a brakeman employed on the train, who, in the absence of the conductor, was authorized to demand and receive it; that the brakeman afterward approached the plaintiff, and, in language coarse, profane and grossly insulting, denied that he had either surrendered or shown him his ticket; that the brakeman called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done the same thing before, and threatened to split his head open and spill his brains right there on the spot; that the brakeman stepped forward and placed his foot upon the seat on which the plaintiff was sitting, and, leaning over the plaintiff, brought his fist close down to his face, and, shaking it violently, told him not to yip, if he did he would spot him; that he was a damned liar; that he never handed him his ticket; that he did not believe he paid his fare either way; that this assault was continued some fifteen or twenty minutes, and until the whistle sounded for the next station; that there were several passengers present in the car, some of whom were ladies, and that they were all strangers to the plaintiff; that the plaintiff was at the time in feeble health, and had been for some time under the care of a physician, and at the time of the assault was reclining languidly in his seat; that he had neither said nor done any thing to provoke the assault; that, in fact, he had paid his fare, had received a ticket, and had surrendered it to this very brakeman who delivered it to the conductor only a few minutes before, by whom it was afterward produced and identified; that the defendants were immediately notified of the misconduct of the brakeman, but, instead of discharging him, retained him in his place; that the brakeman was still in the defendants' employ when the case was tried and was present in court during the trial, but was not called as a witness, and no attempt was made to justify or excuse his conduct.

Upon this evidence the defendants contend that they are not liable, because, as they say, the brakeman's assault upon the plaintiff was willful and malicious, and was not directly nor impliedly authorized by them. They say the substance of the whole case is this, that "the master is not responsible as a trespasser, unless, by direct or implied authority to the servant, he consents to the unlawful act."

The fallacy of this argument, when applied to the common carrier of passengers, consists in not discriminating between the obli-

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gation which he is under to his passenger, and the duty which he owes a stranger. It may be true that if the carrier's servant willfully and maliciously assaults a stranger, the master will not be liable; but the law is otherwise when he assaults one of his master's passengers. The carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants, the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, *a fortiori*, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the willful misconduct of the carrier's servant, the carrier is necessarily responsible.

And it seems to us it would be cause of profound regret if the law were otherwise. The carrier selects his own servants and can discharge them when he pleases, and it is but reasonable that he should be responsible for the manner in which they execute their trust. To their care and fidelity are intrusted the lives and limbs and comfort and convenience of the whole traveling public, and it is certainly as important that these servants should be trustworthy as it is that they should be competent. It is not sufficient that they are capable of doing well, if in fact they choose to do ill; that they can be as polite as a Chesterfield, if, in their intercourse with the passengers, they choose to be coarse, brutal and profane. The best security the traveler can have that these servants will be selected with care is to hold those by whom the selection is made responsible for their conduct.

This liability of the master is very clearly expressed in a recent case in Massachusetts. The court say, that wherever there is a contract between the master and another person, the master is responsible for the acts of his servant in executing that contract, although the act is fraudulent and done without his consent. *Howe*

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v. *Newmarch*, 12 Allen, 55. (Paragraph nearest the bottom of the page.)

And Messrs. Angell and Ames, in their work on corporations (section 388, p. 404, eighth edition), say: "A distinction exists as to the liability of a corporation for the willful tort of its servant toward one to whom the corporation owes no duty except such as each citizen owes to every other, and that toward one who has entered into some peculiar contract with the corporation by which this duty is increased; thus it has been held that a railroad corporation is liable for the willful tort of its servants whereby a passenger on the train is injured."

In *Brand v. Railroad*, 8 Barb. 368, the court say: A passenger on board a stage-coach or railroad car, and a person on foot in the street, do not stand in the same relation to the carrier. Toward the one the liability of the carrier springs from a contract, express or implied, and upheld by an adequate consideration. Toward the other he is under no obligation but that of justice and humanity. Hence a passenger, who is injured by a servant of the carrier, may have a right of action against him, when one not a passenger, for a similar injury, would not.

In *Moore v. Railroad*, 4 Gray, 465, the plaintiff was forcibly put out of a car for not giving up his ticket or paying his fare, when, in fact, he had already surrendered his ticket to some one employed on the train. The defendants insisted that they were not responsible for the misconduct of the conductor; and, further, that an action for an assault would not lie against a corporation. But the court held otherwise, and the plaintiff recovered.

In *Seymour v. Greenwood*, 7 Hurl. & Nor. 354, the plaintiff was assaulted and taken out of the defendant's omnibus by one of his servants. The defendant insisted that he was not liable, because it did not appear that he authorized or sanctioned the act of the servant. But it was held in the exchequer chamber, affirming the judgment of the exchequer court, that the jury did right in returning a verdict for the plaintiff.

In *Railroad v. Finney*, 10 Wis. 388, the plaintiff was unlawfully put out of a car by the conductor. After stating that it was insisted, by the counsel for the railroad, that in no case could a cause of action arise against the principal for the willful misconduct of the agent, the court went on to say, that, after a careful examination of the position, they were satisfied it was not correct; that where the

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misconduct of the agent causes a breach of the principal's contract, he will be liable, whether such misconduct be willful or merely negligent.

In *Railroad v. Vandiver*, 42 Penn. St. R. 365, a passenger received injuries, of which he died, by being thrown from the platform of a railroad car because he refused to pay his fare or show his ticket, he averring he had bought one but could not find it. The evidence showed he was partially intoxicated. It was urged in defense, that if the passenger's death was the result of force and violence, and not the result of negligence, then (such force and violence being the act of the agents alone without any command or order of the company) the company was not responsible therefor. But the court held otherwise. "A railway company," said the court, "selects its own agents at its own pleasure, and it is bound to employ none except capable, prudent and humane men. In the present case, the company and its agents were all liable for the injury done to the deceased."

In *Weed v. Railroad*, 17 N. Y. 362, the jury found specially that the act of the servant by which the plaintiff was injured was willful. The court held the willfulness of the act did not defeat the plaintiff's right to look to the railroad company for redress.

In *Railroad v. Derby*, 14 How. 468, where the servant of a railroad company took an engine and run it over the road for his own gratification, not only without consent, but contrary to express orders, the supreme court of the United States held that the railroad company was responsible.

In *Railway v. Hinds*, 53 Penn. 512, a passenger's arm was broken in a fight between some drunken persons that forced their way into the car at a station near an agricultural fair, and the company was held responsible, because the conductor went on collecting fares, and did not stop the train and expel the rioters, or demonstrate, by an earnest effort, that it was impossible to do so.

In *Flint v. Transportation Co.*, 34 Conn. 554, where the plaintiff was injured by the discharge of a gun dropped by some soldiers engaged in a scuffle, the court held that passenger carriers are bound to exercise the utmost vigilance and care to guard those they transport from violence from whatever source arising; and the plaintiff recovered a verdict for \$10,000.

In *Landreaux v. Bell*, 5 La. (O. S.) 275, the court say that carriers are responsible for the misconduct of their servants toward

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passengers to the same extent as for their misconduct in regard to merchandise committed to their care; that no satisfactory distinction can be drawn between the two cases.

In *Chamberlain v. Chandler*, 3 Mason, 242, Judge STORY declared, in language strong and emphatic, that a passenger's contract entitles him to respectful treatment; and he expressed the hope that every violation of this right would be visited, in the shape of damages, with its appropriate punishment.

In *Nieto v. Clark*, 1 Clifford, 145, where the steward of the ship assaulted and grossly insulted a female passenger, Judge CLIFFORD declares, in language equally emphatic, that the contract of all passengers entitles them to respectful treatment and protection against rudeness and every wanton interference with their persons from all those in charge of the ship; that the conduct of the steward disqualified him for his situation, and justified the master in immediately discharging him, although the vessel was then in a foreign port. And we have his authority for saying that he has recently examined the question with care, in a case pending in the Rhode Island district, where the clerk of a steamboat unjustifiably assaulted and maltreated a passenger, and that he entertains no doubt of the carrier's liability to compensate the passenger for the injury thus received, whether the carrier previously authorized or subsequently ratified the assault or not. A report of the case will soon be published. (See 3 Clifford.)

And a recent and well-considered case in Maryland (published since this case has been pending before the law court, and very much like it in all respects), fully sustains this view of the law. *Railroad v. Blocher*, 27 Md. 277.

The grounds of the carrier's liability may be briefly stated thus:

The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make his passengers' journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to have promised to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier by notice or special contract even to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance

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is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common-law duty in support of his action; in the other, upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort, the jury are allowed greater latitude, and, in proper cases, may give exemplary damages.

II. We now come to the second branch of the case. What is the measure of relief which the law secures to the injured party; or, in other words, can he recover exemplary damages? We hold that he can. The right of the jury to give exemplary damages for injuries wantonly, recklessly or maliciously inflicted, is as old as the right of trial by jury itself; and is not, as many seem to suppose, an innovation upon the rules of the common law. It was settled in England more than a century ago.

In 1763, Lord Chief Justice PRATT (afterward Earl of Camden), with whom the other judges concurred, declared that the jury had done right in giving exemplary damages. *Huckle v. Money*, 2 Wilson, 205.

In another case the same learned judge declared with emphasis, that damages are designed, not only as a satisfaction to the injured person, but likewise as a punishment to the guilty. *Campbell's Lives of the Chancellors*, Am. edition, vol. 5, p. 214.

In 1814 the doctrine of punitive damages was stringently applied in a case where the defendant, in a state of intoxication, forced himself into the plaintiff's company, and insolently persisted in hunting upon his grounds. The plaintiff recovered a verdict for five hundred pounds, the full amount of his *ad damnum*, and the court refused to set it aside. Mr. Justice HEATH remarked in this case that he remembered a case where the jury gave five hundred pounds for merely knocking a man's hat off, and the court refused a new trial. It goes, said he, to prevent the practice of dueling, if juries are permitted to punish insult by exemplary damages. *Merest v. Harvey*, 5 Taunt. 442. See, also, to the same effect, *Scars v. Lyons*, 2 Starkie, 282, decided in 1818.

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In 1844, Lord Chief Baron POLLOCK said, that, in actions for malicious injuries, juries had always been allowed to give what are called vindictive damages. *Doe v. Filliter*, 13 M. & W. 50.

In 1858, in an action of trespass for taking personal property on a fraudulent bill of sale, the defendant's counsel contended that it was not a case for the application of the doctrine of exemplary damages; but the court held otherwise. No doubt, said POLLOCK, C. B., it was a case in which vindictive damages might be given. *Thomas v. Harris*, 27 L. J. Ex. 353.

In 1860, in an action for willful negligence, the defendant contended that the plaintiff's declaration was too defective to entitle him to exemplary damages; but the court held otherwise; and the judge who tried the case remarked that he was glad the court had come to the conclusion that it was competent for the jury to give exemplary damages, for he thought the defendant had acted with a high hand. *Emblen v. Myers*, 6 H. & N. 54.

"Damages exemplary" is now a familiar title in the best English law reports. See 6 H. & N. 969.

It was the firmness with which Lord CAMDEN (then Chief Justice PRATT) maintained and enforced the right of the jury to punish with exemplary damages the agents of Lord Halifax (then secretary of state) for the illegal arrest of the publishers of the *North Briton*, that made him so immensely popular in England. Nearly or quite twenty of those cases appear to have been tried before him, in all of which enormous damages were given, and in not one of them was the verdict set aside. In one of the cases a verdict for a thousand pounds was returned for a mere nominal imprisonment at the house of the officer making the arrest, and the court refused to set it aside. *Beardmore v. Carrington*, 2 Wilson, 244.

"After this," says Lord CAMPBELL, in his "Lives of the Chancellors," "he became the idol of the nation. Grim representations of him laid down the law from sign-post, many busts and prints of him were sold, not only in the streets of the metropolis, but in the provincial towns; a fine portrait of him, by Sir Joshua Reynolds, with the flattering inscription, 'in honor of the zealous assertor of English liberty by law,' was placed in the Guildhall of the city of London; addresses of thanks to him poured in from all quarters; and one of the sights of London, which foreigners went to see, was the great Lord Chief Justice PRATT."

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In this country, perhaps Lord Camden is better known as one of the able English statesmen who so eloquently defended the American colonies against the unjust claim of the mother country to tax them. Lord Campbell says some portions of his speeches upon that subject are still in the mouths of school-boys. But in England his immense popularity originated in his firm and vigorous enforcement of the doctrine of exemplary damages. And we cannot discover that the legality of his rulings in this particular was ever seriously called in question. On the contrary, we find it admitted by his political opponents that he was a profound jurist and an able and upright judge. His stringent enforcement of the right of the jury to punish flagrant wrongs with exemplary damages, arrested not only great abuses then existing, but it has had a salutary influence ever since. It won for him the title of the "asserter of English liberty by law."

In this country the right of the jury to give exemplary damages has been much discussed. It seems to have been first opposed by Mr. Theron Metcalf (afterward reporter and judge of the supreme court of Massachusetts), in an article published in 3 *American Jurist*, 387, in 1830. The substance of this article was afterward inserted in a note to Mr. Greenleaf's work on evidence. Mr. Sedgwick, in his work on damages, took the opposite view, and sustained his position by the citation of numerous authorities. Professor Greenleaf replied in an article in the *Boston Law Reporter*, vol. 9, p. 529. Mr. Sedgwick rejoined in the same periodical, vol. 10, p. 49. Essays on different sides of the question were also published in 3 *American Law Magazine* (N. S.) 537, and 4 *American Law Magazine* (N. S.) 61. But notwithstanding this formidable opposition, the doctrine triumphed, and must be regarded as now too firmly established to be shaken by any thing short of legislative enactments. In fact, the decisions of the courts are nearly unanimous in its favor.

In a case in the supreme court of the United States, Mr. Justice GRIER, in delivering the opinion of the court, says: It is a well-established principle of the common law, that in all actions for torts the jury may inflict what are called punitive or exemplary damages, having in view the enormity of the offense rather than the measure of compensation to the plaintiff. "We are aware," the judge continues, "that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of

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what the law is, the question will not admit of argument." *Day v. Woodworth*, 13 How. 363.

In a case in North Carolina, the court refer to the note in Professor Greenleaf's work on evidence, and say that it is very clearly wrong with respect to the authorities, and in their judgment wrong on principle; that it is fortunate that while juries endeavor to give ample compensation for the injury actually received, they are also allowed such full discretion as to make verdicts to deter others from flagrant violations of social duty. And the same court hold that the wealth of the defendant is a proper circumstance to be weighed by the jury, because a thousand dollars may be a less punishment to one man than a hundred dollars to another. In one case the same court sustained a verdict which in terms assessed the actual damages at \$100, and the exemplary damages at \$1,000. The court held it was a good verdict for \$1,100. *Pendleton v. Davis*, 1 Jones (N. C.), 98; *McAulay v. Birkhead*, 13 Iredell, 28; *Gilreath v. Allen*, 10 id. 67.

In fact, Professor Greenleaf is himself an authority for the doctrine of exemplary damages. Speaking of the action for assault and battery, he says the jury are not confined to the mere corporal injury, but may consider the malice of the defendant, the insulting character of his conduct, the rank in life of the several parties, and all the circumstances of the outrage, and thereupon award such exemplary damages as the circumstances may in their judgment require. 2 Greenl. on Ev., § 89.

But if the great weight of Professor Greenleaf's authority were to be regarded as opposed to the doctrine, we have, on the other hand, the great weight of Chancellor KENT's opinion in favor of it. He says, surely this is the true and salutary doctrine. And after reviewing the English cases, he continues by saying it cannot be necessary to multiply instances of its application; that it is too well settled in practice and too valuable in principle to be called in question. *Tillotson v. Cheetham*, 3 Johns. 56 and 64.

This brief review of the doctrine of exemplary damages is not so much for the purpose of establishing its existence, as to correct the erroneous impression which some members of the legal profession still seem to entertain, that it is a modern invention, not sanctioned by the rules of the common law. We think every candid-minded person must admit that it is no new doctrine; that its existence as a fundamental rule of the common law has been reco-

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ognized in England for more than a century; that it has been there stringently enforced under circumstances which would not have allowed it to pass unchallenged, if any pretext could have been found for doubting its validity; and that in this country, notwithstanding an early and vigorous opposition, it has steadily progressed, and the decisions of the courts are now nearly unanimous in its favor. It was sanctioned in this state, after a careful and full review of the authorities, in *Pike v. Dilling*, 48 Me. 539, and cannot now be regarded as an open question.

But it is said that if the doctrine of exemplary damages must be regarded as established in suits against natural persons for their own willful and malicious torts, it ought not to be applied to corporations for the torts of their servants, especially where the tort is committed by a servant of so low a grade as a brakeman on a railway train, and the tortious act was not directly nor impliedly authorized nor ratified by the corporation; and several cases are cited by the defendants' counsel, in which the courts seem to have taken this view of the law; but we have carefully examined these cases, and in none of them was there any evidence that the servant acted wantonly or maliciously; they were simply cases of mistaken duty; and what these same courts would have done if a case of such gross and outrageous insult had been before them as is now before us, it is impossible to say; and long experience has shown that nothing is more dangerous than to rely upon the abstract reasoning of courts, when the cases before them did not call for the application of the doctrines which their reasoning is intended to establish.

We have given to this objection much consideration, as it was our duty to do, for the presiding judge declined to instruct the jury that if the acts and words of the defendants' servant were not directly nor impliedly authorized nor ratified by the defendant, the plaintiff could not recover exemplary damages. We confess that it seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an

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imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence called a corporation. And yet under cover of its name and authority, there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung, imprisoned, whipped, nor put in the stocks, — since, in fact, no corrective influence can be brought to bear upon them except that of pecuniary loss, — it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggagemen can be secured, who will not handle and smash trunks and bandboxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences called corporations; and that is, the pocket of the moneyed power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before.

It is our judgment, therefore, that actions against corporations, for the willful and malicious acts of their agents and servants in

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executing the business of the corporation, should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest courts in the country.

In a case in Mississippi, the plaintiff was carried four hundred yards beyond the station where he had told the conductor he wished to stop; and he requested the conductor to run the train back, but the conductor refused, and told the plaintiff to get off the train or he would carry him to the next station. The plaintiff got off and walked back, carrying his valise in his hand. The plaintiff testified that the conductor's manner toward him was insolent, and the defendants having refused to discharge him, the jury returned a verdict for four thousand five hundred dollars, and the court refused to set it aside. They said the right of the jury to protect the public by punitive damages, and thus prevent these great public blessings from being converted into the most dangerous nuisances, was conclusively settled; and they hoped the verdict would have a salutary influence upon their future management. *Railroad, in Error, v. Hurst*, 36 Miss. 660.

In New Hampshire, in an action against this identical road, where, through gross carelessness, there was a collision of the passenger train with a freight train, and the plaintiff was thereby injured, the judge at *nisi prius* instructed the jury that it was a proper case for exemplary damages; and the full court sustained the ruling, saying it was a subject in which all the traveling public were deeply interested; that railroads had practically monopolized the transportation of passengers on all the principal lines of travel, and there ought to be no lax administration of the law in such cases; and that it would be difficult to suggest a case more loudly calling for an exemplary verdict. [If mere carelessness, however gross, calls loudly for an exemplary verdict, what shall be said of an injury that is willful and grossly insulting?] *Hopkins v. At. & St. Lawrence Railroad*, 36 N. H. 9.

Judge Redfield, in his very able and useful work on railways expresses the opinion that there is quite as much necessity for holding these companies liable to exemplary damages as their agents. He says it is difficult to perceive why a passenger, who suffers indignity and insult from the conductor of a train, should be compelled to show an actual ratification of the act, in order to subject

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the company to exemplary damages. 2 Redfield on Railways, 231, note. But if such a ratification is necessary, he thinks the corporation, which is a mere legal entity, inappreciable to sense, should be regarded as always present in the person of its servant, and as directing and ratifying the servant's acts within the scope of his employment, and thus be made responsible for his willful misconduct. 1 Redfield on Railways, 515, *et seq.*

And in a recent case in Maryland (published since this case has been pending before the law court), a case in all respects very similar to the one we are now considering, the presiding judge was requested to instruct the jury that the plaintiff was not entitled to recover vindictive or punitive damages from the defendants, unless they expressly or impliedly participated in the tortious act, authorizing it before or approving it after it was committed; but the presiding justice refused to so instruct the jury, and the full court held that the request was properly rejected; that it was settled that where the injury for which compensation in damages is sought is accompanied by force or malice, the injured party is entitled to recover exemplary damages. *Railroad v. Blocher*, 27 Md. 277.

But the defendants say that the damages awarded by the jury are excessive, and they move to have the verdict set aside and a new trial granted for that reason. That the verdict in this case is highly punitive, and was so designed by the jury, cannot be doubted; but by whose judgment is it to be measured to determine whether or not it is excessive? What standard shall be used? It is a case of wanton insult and injury to the plaintiff's character and feelings of self-respect, and the damages can be measured by no property standard. It is a case where the judgment will be very much influenced by the estimation in which character, self-respect and freedom from insult are held. To those who set a very low value on character, and think that pride and self-respect exist only to become objects of ridicule and sport, the damages will undoubtedly be considered excessive. It would not be strange if some such persons, measuring the sensibilities of others by their own low standard, should view this verdict with envy, and regret that somebody will not assault and insult them, if such is to be the standard of compensation; while others, who feel that character and self-respect are above all price, more valuable than life itself, even, will regard the verdict as none too large. We repeat, therefore, that it is a case where men's judgments will be likely to differ. And suppose the

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court is of the opinion that the damages in this case are greater, much greater, even, than they would have awarded, does it therefore follow that the judgment of the court is to be substituted for that of the jury? By no means. It is the wisdom of the law to suppose that the judgment of the jury is more likely to be right than the judgment of the court, for it is to the former and not to the latter that the duty of estimating damages is confided. Unless the damages are so large as to satisfy the court that the verdict was not the result of an honest exercise of judgment, they have no right to set it aside.

A careful examination of the case fails to satisfy us that the jury acted dishonestly, or that they made any mistake in their application of the doctrine of exemplary damages. We have no doubt that the highly punitive character of their verdict is owing to the fact, that, after Jackson's misconduct was known to the defendants, they still retained him in their service. The jury undoubtedly felt that it was due to the plaintiff, and due to every other traveler upon that road, to have him instantly discharged; and that to retain him in his place, and thus shield and protect him against the protestation of the plaintiff, made to the servant himself at the time of the assault, that he would lose his place, was a practical ratification and approval of the servant's conduct, and would be so understood by him and by every other servant on the road.

And when we consider the violent, long-continued, and grossly insulting character of the assault; that it was made upon a person in feeble health, and was accompanied by language so coarse, profane and brutal; that so far as appears it was wholly unprovoked; we confess we are amazed at the conduct of the defendants in not instantly discharging Jackson. Thus to shield and protect him in his insolence, deeply implicated them in his guilt. It was such indifference to the treatment the plaintiff had received, such indifference to the treatment that other travelers might receive, such indifference to the evil influence which such an example would have upon the servants of this and other lines of public travel, that we are not prepared to say the jury acted unwisely in making their verdict highly punitive. We cannot help feeling that if we should interfere and set it aside, our action would be most unfortunate and detrimental to the public interests. On the contrary, if we allow it to stand, we cannot doubt that its influence will be salutary. It will be an impressive lesson to these defendants, and to the mana-

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gers of other lines of public travel, of the risk they incur when they retain in their service servants known to be reckless, ill-mannered, and unfit for their places. And it will encourage those who may suffer insult and violence at the hands of such servants, not to retaliate or attempt to become their own avengers, as is too often done, but trust to the law and to the courts of justice for the redress of their grievances. It will say to them, be patient and law-abiding, and your redress shall surely come, and in such measure as will not add insult to your previous injury.

On the whole, we cannot doubt that it is best for all concerned that this verdict be allowed to stand.

We see nothing in the rulings or charge of the presiding judge of which the defendants can justly complain. And there is nothing to satisfy us that the jury were prejudiced or unduly biased; or that they made any mistake either as to the facts or the law. Our conclusion, therefore, is, that the exceptions and motion must be overruled.

Motions and exceptions overruled.

NOTE. TAPLEY, J., dissented from the foregoing opinion so far as relates to the rule of damage, and wrote a very elaborate opinion in support of his views.

On the question of the liability of the master for the act of his servant, Judge TAPLEY cited the following authorities: Dane's Abridgment of American Law, vol. 2, ch. 5, art. 2; Bacon's Abr., vol. 4, title, "Master and Servant;" 2 Kent's Com. 259; *Wright v. Wilcox*, 19 Wend. 343; *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 480; S. C., 2 N. Y. 479; *Hibbard v. New York and Erie R. R. Co.*, 15 Id. 455; *Story's Agency*, §§ 452, 456; *Hilliard on Torts*, ch. 40; *Parsons v. Winchell*, 5 Cush. 562; *Southwick v. Estes*, 7 Id. 395; *Philadelphia, Wilmington and Baltimore R. R. Co. v. Quigley*, 21 How. (U. S.) 202; *Feed v. Panama R. R. Co.*, 17 N. Y. 362.

"From an examination of these authorities," the judge adds, "I think it will be found that the principal is liable for the acts of his agents in three classes of cases: I. When the act is done by previous command of the principal, or is subsequently ratified or adopted by him. This demand may appear from proof of specific directions, or implied from the circumstances of the case. II. When the agent negligently, unskillfully or otherwise improperly performs the duties pertaining to his employment. III. When the act of the agent has caused the breach of a contract, or prevented the performance of an obligation, due from and existing between the principal and a third person."

The case at bar comes within the third class.

That the defendants were not liable to punitive damages: *Hagan v. Prov. & W. R. R. Co.*, 3 R. I. 88; *Railroad v. Finney*, 10 Wis. 938; *Turner v. The North Beach and Mission R. R. Co.*, 34 Cal. 594; *Pleasants v. Same Defts.*, Id. 598; *Clark v. Newcom*, 1 Exch. 131; *Akerman v. Erie R. R. Co.*, 32 N. J. 254; *McKeon v. Citizens' Railway Co.*, 42 Mo. 79; *Louisville and P. R. R. Co. v. Smith*, 2 Duval (Ky.) 556; *Hill v. New Orleans and Opelousas R. R. Co.*, 11 Louisiana, 282; *Keene v. Lezardi*, 8 Id. 26; *Jeffersonville R. R. Co. v. Rogers*, 26 Ind. 1; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Kline v. Central Pacific R. R. Co.*, 37 Cal. 400; *Amiable Nancy*, 3 Wheat. 546; *Wardrobe v. California Stage Co.*, 7 Cal. 118; *Mundy v. McDonald*, 4 Id. 297; *McLellan v. Cumberland Bank*, 24 Me. 566; *Hopkins v. Atlantic and St. Lawrence R. R. Co.*, 36 N. H. 1.—REP.

CITY OF AUGUSTA V. NORTH.

(57 Me. 302.)

Taxes — when assessed not a "debt" — Constitutional Law.

a tax duly assessed is not a debt within the meaning of that provision of the constitution, which prohibits the legislature from passing any law impairing the obligation of a contract.

ACTION of assumpsit to collect a sum assessed as taxes on the defendants as commissioners of the Kennebec and Portland Railroad Company, under act of 1868, chap. 160.

The case appears in the opinion.

W. P. Whitehouse, for plaintiff

J. W. Bradbury and *A. Libbey*, for defendant.

APPLETON, C. J. By an act approved February 17, 1868, chap. 60, personal estate, held as a trust fund, was made liable to taxation.

By virtue of that statute, the tax in question was duly assessed on the defendants as commissioners of the sinking fund of the Kennebec and Portland Railroad Company, and the lists were seasonably committed to the collector for collection.

The act approved March 12, 1869, chap. 63, repeals chap. 160 of the preceding year, under and by virtue of which the tax in dispute was assessed. By section 3, the act took effect when approved.

By section 2, "No proceedings under the act hereby repealed shall be hereafter enforced."

The plaintiffs seek to enforce the collection, notwithstanding the express prohibition contained in section 2, on the ground that a tax duly assessed is a debt within the meaning of the provision of the constitution of this state, art. 1, section 11, which prohibits the legislature from passing any law "impairing the obligation of contracts."

But a tax duly assessed is not a debt. It is an impost levied by the authority of the state upon its citizens. There is no promise on their part to pay. The proceedings throughout are *in invitum*. A debt is a sum due by express or implied agreement. It was held in *Pierce v. Boston*, 3 Met. 520, that taxes, being neither judgments

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nor contracts, were not the subject of set-off. "Nor are taxes," observes SHAW, C. J., "contracts between party and party either express or implied, but they are the positive acts of the government through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent, individually, is not required." In *Shaw v. Peckott*, 26 Vt. 482, it was held that the assessment of taxes did not create a debt that could be enforced by suit, or upon which a promise to pay interest could be implied. In *Lane County v. Oregon*, 7 Wall. 71, it was decided that the clauses in the several acts of congress of 1862 and 1863, making United States notes a legal tender for debts, had no reference to taxes imposed by state authority, the court holding that congress had in contemplation "debts originating in contract or demands carried into judgment, and only debts of this character."

The only clause in the constitution of this state relating to taxes is found in article 1, section 22, and is in these words: "No tax or duty shall be imposed without the consent of the people or of their representatives in the legislature." But this section relates only to the imposition of taxes. It in no respect limits or restricts the power of the legislature to repeal any act by which taxes have been imposed, or to prohibit their collection. The legislature have the same right to remove a burden as to impose it. It was a matter for their determination, and it is not for this court to say that a tax shall be enforced, which they, by statute, decree shall not be enforced.

Plaintiffs nonsuit.

CRATTY V. CITY OF BANGOR, appellant.

(87 Me. 426.)

Unlawfully traveling on Sabbath day — Defect in highway.

A person traveling on the Sabbath day to the house of a friend for pleasure is so far in violation of a law against traveling on the Sabbath day, unless for charity or necessity, that he cannot maintain an action against a town for injuries from a defect in the way.

THE action was brought to recover for injuries received by the plaintiff from a defect in defendant's highway while he was traveling on foot on a Sunday, with some other persons, to make a visit of pleasure at the house of a friend.

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The defendant contended that the plaintiff was, at the time of the injury, traveling for pleasure on the Sabbath day, in violation of the statute prohibiting traveling on that day, except for charity or necessity. The objection was overruled and a verdict rendered for the plaintiff. The defendant alleged exceptions.

Mace & Laughton, for plaintiff.

A. L. Simpson, for defendant.

DANFORTH, J. That the statute renders towns and cities liable for injuries, on account of a defect in the highway, to travelers on foot, as well as those with horses, has been too often and too long recognized by the courts to be now reversed without an act of the legislature. Upon this point the ruling is right, and we think in accordance with a fair rendering of the statute.

A person traveling upon the Sabbath, unless for charity or necessity, is so far in the violation of law that he cannot maintain an action for injuries by a defect of the way. *Hinckley v. Penobscot*, 42 Me. 81.

No distinction is made between those who travel in town and those who travel from town to town. The former are as much in violation of the law as are the latter. *Tillock v. Webb*, 56 Me. 100.

Nor does the statute for the due observance of the Sabbath make any distinction between those who travel on foot and those who travel in carriages. It is the traveling which is prohibited. R. S., chap. 124, § 20, as amended by Public Laws of 1864, chap. 281.

The plaintiff was not out for a walk, only, as in *Hamilton v. Boston*, 14 Allen, 475, but was going to a place other than his home, and that, too, for pleasure. In the opinion in the case last cited, GRAY, J., says: "But, confining ourselves to the facts disclosed by this bill of exceptions, we are of the opinion that a person walking with a friend on Sunday evening, less than half a mile, with no apparent purpose of going to or stopping at any place but his own home, much less of passing out of the city, and no object of business or pleasure, except open air and gentle exercise, is not guilty of traveling," etc., thus plainly intimating that in such a case as the one at bar the decision would have been different.

If our statute is wrong, if those who pass to a place other than their home, within their own town, for purposes of pleasure, should

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be exempt from the provisions of the statute, the legislature is the proper tribunal to make the change. It is, however, very clear that the plaintiff met with his accident while in the violation of the plain provisions of the statute, and it is not competent for the court to make exemptions from the law which the legislature have not.

Exceptions sustained.

DENNETT V. PENOBSCOT FAIR GROUND COMPANY.

(97 Me. 495.)

Vendor and Purchaser — Occupation under contract to purchase — Rent.

When a person occupies real estate under a contract for the purchase of it, and the contract is ultimately carried into effect, the law will not imply a promise on his part to pay rent, and an action for use and occupation cannot be maintained against him in the absence of an express promise to pay rent.

ACTION of assumpsit for use and occupation of certain premises. The plaintiff and defendant entered into a contract in April, 1864, by which the former was to convey and the latter to purchase the premises in question. The defendant went into occupation soon after, and continued until June 1865, when the contract was consummated.

N. Wilson and J. E. Rowe, for plaintiff.

C. P. Stetson, for defendant.

WALTON, J. When a person occupies real estate under a contract for the purchase of it, and the contract is ultimately carried into effect, and there is no express promise on the part of the purchaser to pay rent, the law will not imply one, and an action for use and occupation cannot be maintained against him. The circumstances under which he occupies repel any such implication. The price agreed upon is presumed to be a sufficient consideration for the intermediate occupation of the land, as well as the ultimate conveyance of the title to it. The title of the purchaser, so far as his right to occupy is concerned, relates back to the time when he first took possession under his contract to purchase; or, as the rule is

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sometimes expressed, the previous tenancy is merged in the subsequent conveyance of the fee. Thus, in *Gould v. Thompson*, 4 Met. 224, where the plaintiff recovered because the defendant continued to occupy the premises after having refused to execute his contract to purchase, the court say, that, "had the deed in fact been given pursuant to the parol agreement, then the tenancy at will would be considered as merged in the executed contract, which, by its terms, would relate back to the time that possession was given under that agreement." Similar language is used in *Woodbury v. Woodbury*, 47 N. H. 11. And in *Dakin v. Allen*, 8 Cush. 33, SHAW, C. J., says: "But it is sometimes said that one who is in thus under a contract for a sale is tenant at will to the owner; in a certain sense he is a tenant at will, as a mortgagor is tenant at will to the mortgagee, because he may enter upon and eject him, if he can do it peaceably, or maintain a real action on his title, and thus gain the possession; he is under no obligation to pay rent unless upon an express agreement."

No express promise to pay rent is proved in this case. The defendants entered under a contract to purchase. This contract was not executed within the time first agreed upon, and the plaintiff could have treated it as rescinded if he had chosen so to do. But he did not so treat it. He renewed it from time to time, making no claim for rent, till it was finally consummated, and the conveyance actually made. Under these circumstances the law will not imply a promise to pay rent. The relations of the parties, and the circumstances under which the defendants occupied, repel any such implication.

Plaintiff nonsuit.

LEE V. PEMBROKE IRON COMPANY.

(57 Me. 481.)

Riparian rights — Legislative authority to build dam.

The defendants, in pursuance of authority granted them by the legislature, built a dam, which backed the water upon the ancient mill of plaintiff. Held, that defendants were liable for the injury occasioned.

A legislative authority to do an act which will naturally result in damages to private property must be coupled with provisions for ascertaining and paying such damages in order to protect persons acting under such authority from liability at common law.

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ACTION to recover damages occasioned to an ancient mill owned by the plaintiff, by a dam built across the Pennemaquan river by defendants in pursuance of an act of the legislature.

The facts appear in the opinion.

J. Granger, for plaintiff.

Brian Bradbury, for defendants.

BARROWS, J. The plaintiff claims in this action to recover damages done to his grist-mill, situated on the Pennemaquan river, by means of back water caused by defendant's dam at Bluff Head, a short distance below the plaintiff's mill. The Pennemaquan is a small stream having a succession of rapids near its mouth. Technically speaking, it is navigable at the plaintiff's mill, the tide flowing there, as the jury have found, six or eight inches.

The plaintiff, and those under whom he claims, have been in the occupancy and use of the mill and privilege, continuously, since 1832; and were so for more than twenty years before the passage of the private act by the legislature, under which the defendants claim that they are relieved from the payment of damages.

Plaintiff's title to his mill, his right to the undisturbed use and enjoyment of it as his own private property, cannot be successfully impeached. Defendant's dam was built in 1853, and has been maintained under the authority conferred by chap. 164, Private and Special Laws of 1853, which makes part of the case.

The only ruling complained of is, that "if the plaintiff is otherwise entitled to recover, and the maintaining the dam at Bluff Head was the immediate and sole cause of the overflowing of the plaintiff's mill, the legislative grant of authority to maintain said dam on tide-waters would not protect the defendants from a liability to pay such damages as were the direct and natural consequences of the overflowing of the plaintiff's mill." The act of 1853 authorizes the parties whom the defendants represent to maintain the dam on their own land at a point described, in a manner specified, affording certain conveniences to those wishing to make use of the stream as a highway, but making no provision for assessing the damages caused to private property thereby.

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The ruling simply disaffirms a position that a party can justify a direct infringement upon another's property, under an act of the legislature which provides no mode of assessing the damages to the property thus encroached upon. It affirms, that for such direct injury the common-law remedy still remains to the injured party.

Such a limitation of the effect of a grant of legislative authority to do a particular act is necessary if we would conform, in their true spirit, to the constitutional provisions that private property shall not be taken for public uses without just compensation, and that "every person for injury done him in his * * * property, * * * shall have remedy by due course of law."

It cannot be necessary to waste time or words to establish the proposition that he who assumes, under color of legislative authority, to overflow an ancient mill, "takes" that mill and privilege from the owner as directly and effectually as though he entered upon the premises and demolished the building. The truth of it is self-evident.

That a legislative grant of authority to do an act which is the immediate and sole cause of such a destruction of his neighbor's property shall not be so construed as to protect the party doing it from being required in some form to make just compensation, or to preclude the injured party from a remedy by due course of law, is a necessary sequence from the constitutional provisions referred to.

In *Perry v. Wilson*, 7 Mass. 393, where the defendant undertook to justify, as a member and servant of a corporation which was created by statute, for the purpose of "making, laying and maintaining side-booms at convenient places in the Androscoggin river," PARSONS, C. J., in an opinion overruling the justification, and sustaining the plaintiff's action, says: "The legislature might have appropriated the plaintiff's close to public uses without his consent, provided a reasonable compensation had been made him therefor. But in this statute no compensation is provided, nor any means of ascertaining or securing the payment of it declared. If, then, this act was construed to be an appropriation of the plaintiff's lot for the use of the public, such appropriation would be unconstitutional and void." "Therefore," the justification alleged was held insufficient. In *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 460, PARKER, C. J., says. "In the declaration of rights prefixed to our constitution, it is provided that private property shall not be taken or appropriated to public uses without compensation to the owner. So

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that, if the legislature should, for public advantage and convenience, authorize any improvement the execution of which would require or produce the destruction or diminution of private property, without affording at the same time means of relief and indemnification, the owner of the property destroyed or injured would undoubtedly have his action at common law against those who should cause the injury, for his damages. For although it might be lawful to do what the legislature should authorize, yet, to enforce the principles of the constitution for the security of private property, it might be necessary to consider such a legislative act as inoperative, so far as it trench upon the rights of individuals."

In *Cogswell v. Essex Mill Corporation*, 6 Pick. 94, it was held that, where the legislature authorized a corporation to build across a navigable river a mill dam of a given height, and to keep up the same head of water throughout the year, but provided no remedy for any person whose lands should thereby be injuriously flowed, the remedy must be by an action at common law, PARKER, C. J., remarking: "What, then, is the remedy, if any one is injured by the execution of the act of the legislature.' An action at common law. The act gives the right to erect the dam in a form supposed to be sufficient to protect from injury the property of the land-owners. If it turns out insufficient, they will have an action for the consequent injury."

In *Thacher v. Dartmouth Bridge Co.*, 18 Pick. 501, SHAW, C. J., after holding that, if the act of incorporation were to be construed as conferring a power to take private property for public uses without the payment of an adequate indemnity, it would be unconstitutional and void, proceeds as follows: "The consequence would be that the party damaged would be remitted to his remedy at common law; the wrongful act would stand unjustified by legislative grant. This has been so often decided in this commonwealth that it must be taken as a settled principle." The same principle is recognized in *Comins v. Bradley*, 1 Fairf. 447, WESTON, J., remarking that "compensation must be made or provided for when the property is taken. It is upon that condition alone that such taking is authorized."

In *Crittenden v. Wilson*, 5 Cowen, 165, it was decided that an act authorizing one to build a dam on his own land across a river that is a public highway, protects him only against an indictment, and not against the claim of a party whose land is thereby flowed.

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The form of the remedy has often been the subject of judicial inquiry; but that the party, whose property has been thus invaded under the sanction of legislative authority, must have some remedy, under the common law, if no statute remedy is furnished or found applicable, has never before now been denied.

The cases cited to support the denial will all be found, on examination, to be claims of indirect and consequential damages accruing from the abridgment or subversion of those rights which the party complaining had in common with the rest of the public; a class of rights which, of course, it was competent for the legislature, in the exercise of their sovereign power of domain, to surrender or to grant to those who would improve them, whenever it was found to be for the public interest so to do. Such a grant is no infringement upon private property.

It is the power of the legislature to control such rights, only, that is asserted in *Commonwealth v. Breed*, 4 Pick. 460.

It was precisely such damages, and such only, that were claimed in *Spring v. Russell*, 7 Me. 273.

So it is also in *Parker v. Cutler Mill Dam Co.*, 20 Me. 353, the case chiefly relied on in defense. The injury to his fishing privileges, and the obstruction to his free access to his land from the sea were the matters of which the plaintiff there complained. The case expressly finds that "no part of his land was flowed." He had no erections of any kind on his premises. He had "a place to build a wharf," but no wharf. If he had a mill site for a tide mill (as one expression in the opinion seems to intimate), it does not appear that he ever had a mill. The defendants, under their act of incorporation, were the first appropriators of the water for milling purposes, and of that he would have no right to complain, even if he was thereby prevented from making a like use of it. See 2 Washb. on Real Prop. 66. In fine, it is only by a perversion of the opinion, and the omission of an important member of the sentence quoted from it, that it can be made to bear the construction which the defendants here seek to give it. The opinion declares that "the corporation is not, therefore, liable for any injury which the plaintiff may have suffered by obstructions to the navigation by altering the flux and reflux of the tide.

No private or exclusive rights of Parker had been invaded. It was not the case of an ancient mill entitled to the flow of the water *ut currere solebat*. His rights of fishing and navigation were those

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which he possessed as one of the public, and these rights were subject to the power of eminent domain, vested in the representatives of the public to whom they belonged.

But for the security of private rights in property they are placed beyond the reach of arbitrary specific legislation by the fundamental law of the state, and guarded by constitutional barriers which are always to be carefully regarded.

The case of *Parker v. The Cutler Mill Dam Co.* is not an authority for the doctrine that a legislative grant can afford immunity to a party in the infliction of a direct injury upon private property or vested individual rights.

Redress for such injuries the courts have always been ready to afford in some form, though caused by the acts of a company which are authorized by their charter.

Thus injuries necessarily caused by a railroad company to adjacent lands or buildings, in the careful exercise of their right of construction and grading, are to be included in the estimate made by commissioners or jury sitting for that purpose. *Whitshouse v. Androscoggin Railroad Co.*, 52 Me. 208; *Dodge v. County Com. of Essex*, 3 Met. 380.

The provision in the charter, or by general law, of a specific mode of ascertaining and securing proper indemnity, confers no right to damages which did not exist before. Under our constitution the omission to make such provision can take away none but those that pertain to the common privileges that belong to the public, and which the legislature, as guardians of the public weal, have the power to control. Private property—individual rights—are preserved without specific mention made of them by virtue of the constitutional guaranties.

The legislative authority to do the act which, however carefully done, will naturally result in damage to private property, must be coupled with provisions for ascertaining such damage and securing an indemnity to the injured party, in order to prevent those who act under it from being dealt with at common law as wrong-doers. The legislature has no power under the constitution to make over to any individual or corporation any right save those of the public, without securing a just compensation. It is but just to presume that they have no intention to exceed their powers, and that where no specific mode of ascertaining damages is provided they design to leave the parties to the common-law method of ascertaining them.

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So if it be said by those who regard form more than substance, words more than the ideas they are designed to express, that the plaintiff's mill was not taken, but only overflowed, it will make no difference. The other constitutional provision, to which reference has been made, securing to every person, for an injury done him in his property, a remedy by due course of law, must cover the case. The doctrine contended for by the defendants is as novel as it is untenable.

Exceptions overruled.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

HUSON, appellant, v. DALE.

(19 Mich. 11.)

Slander — Evidence under general issue to mitigate damages.

In an action of slander the defendant pleaded the general issue only, without notice of special matter. At the trial he offered evidence tending to prove the truth of the charge for the purpose only of rebutting malice and mitigating damages. *Held*, that such evidence was admissible.

If the defendant wishes to rely on the truth of the charge as justification he must plead it; but he may introduce evidence tending to prove its truth, to rebut malice, under the general issue and without notice.

ACTION of slander; verdict and judgment for plaintiff.

H. J. Beakes, for plaintiff in error.

A. Felch, for defendant in error.

CHRISTIANCY, J. This was an action of slander brought by Dale against Huson in the circuit court of Washtenaw county.

The slanderous words alleged in the declaration were that defendant below had said of the plaintiff, "He stole my horse;" also the following: "By. Green and John Dale" (meaning one Byron Green and the plaintiff) "stole my horse."

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The defendant pleaded the general issue only, without notice of special matter. The speaking of the words of and concerning the plaintiff was proved, and the plaintiff rested.

The defendant Huson then offered in evidence, under the general issue to rebut malice, and in mitigation of damages, and for no other purpose, among other things:

1. The record and files in a case then pending in the same court in a cause wherein Byron Green and said Dale were plaintiffs, and defendant Huson was defendant, brought in replevin to get possession of the horse (charged by the defendant Huson to have been stolen), and to show in connection therewith that said Dale directed the deputy sheriff, who had the writ of replevin for service, not to serve the same, nor take the horse, until Saturday night, so that they, Green and Dale, could get possession of the horse and run him out of the county; and that the horse was so taken and run out of the county, which led the defendant Huson to believe that the process was used as a matter of form to obtain possession of the horse, and not on the ground that they claimed the horse as their property; and further to show all the facts and circumstances connected therewith, merely to rebut any presumption of malice in speaking the words, and for no other purpose.

2. The defendant having, in his own behalf, testified that there were reports in the neighborhood before the speaking of the words, of their having stolen the horse; that certain persons had told him they had stolen the horse and ran him off to Toledo; that several had told him he ought to take them up for stealing the horse; and that on Saturday before the words were spoken, he took advice of counsel, Messrs. Beaks and Hawkins (who are attorneys of this court), as to what the offense was, and in substance (for such was the effect of the several offers upon this point), to show that he correctly stated the facts to his said counsel, and what those facts were; and that he was advised by his said counsel that such state of facts would constitute larceny.

These offers with others were rejected, the testimony excluded and the defendant excepted.

The rejection of this evidence is sought to be justified on the ground that its tendency would have been to establish the truth of the charge imputed by the slanderous words; and that the defendant, having pleaded the general issue, only, without notice of justifi-

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cation, was not at liberty to introduce such evidence, even for the purpose of rebutting malice and mitigating the damages.

No question in modern times has, perhaps, given rise to a greater amount of judicial controversy. The conflict in the decisions upon it is absolutely appalling. And the attempt to trace the line of mere authority through the maze of hostile decisions would be calculated only to confuse and lead the mind astray from the real principles of justice involved in it, and could serve no useful end. A careful review of the decisions would require volumes, and I shall not attempt it.

At the common law, prior to the decision in the case of *Underwood v. Parks*, 2 Strange, 1200, the question here presented would have been easy of solution. Because, 1st, by the well-settled principles of pleading (which that case did not undertake in this respect to change) no facts falling short of a complete defense could be set up by way of special plea to the action, and a mere partial defense, or facts going only in mitigation of damages, might always be shown under the general issue. And, 2d, the defendant in an action of slander was at liberty to prove the truth of the charge itself, under the general issue to rebut malice and mitigate the damages, though this would have constituted a full defense, had it been pleaded in justification.

But in *Underwood v. Parks*, the defendant, under the plea of not guilty, offering to prove the truth of the words in mitigation, the chief justice refused it, saying: "At a meeting of all the judges, upon a case that arose in the common pleas, a large majority of them had determined not to allow it, *for the future*, but it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words."

It is clear from the terms in which it was announced that this was a new rule of pleading, then for the first time introduced, for the purpose of preventing surprise upon the plaintiff. And if the rule had subsequently been confined to cases like that in which it was announced, when the offer was to prove the truth of the words, which if pleaded would have constituted a full justification, the operation of the rule might have been rendered beneficent, and much of the conflict which has since arisen from it might have been avoided. But cases have been and will continue to be of frequent occurrence, in which the defendant, though he may have believed and had reason to believe the truth of the charge when uttered,

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cannot, and does not upon the trial, seek to establish the truth of the charge, and is even willing to admit its falsehood, but wishes to show, in excuse, that, at the time he uttered it, he had reason to believe its truth, and was not therefore actuated by that malice or degree of malice which might otherwise be inferred from the making of the false charge or from other evidence of malice introduced by the plaintiff. And, to apply the rule in question to this class of cases, must always produce the most glaring injustice to the defendant, depriving him of the benefit of all such mitigating circumstances, and compelling him to respond in damages to the same extent as if he had been actuated by the most vindictive malice.

The English courts, and most of those in this country, have admitted the authority of the rule laid down in this case, and professed to follow it, though with the greatest possible diversity in its interpretation and the extent of its application. The defendant, of course, has not been allowed to plead these mitigating circumstances, because they do not constitute a justification or complete defense. And in some of the English and many of the American cases, when he has undertaken to introduce them under the general issue in mitigation, he has been told that they are inadmissible under the rule in *Underwood v. Parks*, because he has not insisted upon the truth of the words by a plea or notice of justification. If, on the other hand, he has put in such a plea or notice, and failed to sustain it by the proof, then, under another rule of a most arbitrary and anomalous character (which has fortunately been abolished in this state and many of the other states by statute), his plea or notice was held to be a repetition of the slander in the most solemn form, conclusive evidence of malice, and an aggravation of the damages.

It is universally conceded that some degree of malice in the defendant is essential to the maintenance of the action. This malice is sometimes said to be either express or implied; but in both cases it is actual malice, or malice in fact, the difference being only in the mode of proof; and in both cases the burden of making this proof rests upon the plaintiff. What is called express malice is shown by some affirmative proof beyond that of the false and slanderous words; while implied malice is that which is naturally inferred as a presumption of fact from the proof of the publication of the false and injurious charge, on the familiar principle that a man is presumed to intend the natural and ordinary consequences of his own voluntary acts, and that he would not, therefore, make a

false charge injurious to another without intending to injure him, unless under circumstances which indicate an innocent intention. But in both cases alike it is actual malice which the law contemplates. Such being the principle, it follows as a necessary result, and is very generally admitted by the authorities (however differing in other respects), that the amount of damages to be recovered should, to some extent, be governed or graduated by the degree of malice by which the defendant was actuated. And accordingly, upon this principle (for it can be upon no other), most, if not all, the cases which profess to follow the authority of *Underwood v. Parks*, though differing in many other respects, *toto casu*, yet entirely concur in this, that the plaintiff may, for the purpose of enhancing or aggravating the damages, give other and affirmative proof of actual malice beyond that which is to be inferred from the false charge; such as the repetition of the same charge on other occasions, or other facts tending to show a vindictive motive; and some cases have gone so far as to admit evidence of other and independent slanderous charges for this purpose. And yet the courts in several of the states, professing to follow the rule in *Underwood v. Parks*, have often, in the same case in which they have allowed the plaintiff to give such evidence to enhance the damages, practically held the defendant precluded from giving any evidence tending to rebut malice and to mitigate the damages. On principle, independent of artificial rules and in courts which recognize justice as one of the ends to be attained by a judicial trial, it would certainly seem that these must be reciprocal rights on the part of the plaintiff and the defendant, and that the plaintiff could not be allowed to give such additional proof of actual malice to enhance the damages, without, at the same time and upon the same principle, allowing the defendant to show any facts to rebut the malice and to mitigate the damages. Because the rule in *Underwood v. Parks* did not allow the defendant to prove and rely upon the truth of charge even in mitigation without pleading it in justification, it was supposed to follow, as an inevitable logical consequence, that he could not be allowed to show any facts which might tend to establish the truth of the charge. This was the rule actually adopted in some of the states, and which in some of them would seem to be still recognized. And as any evidence the defendant might offer to show that the charge was made under circumstances which might have induced him to believe it true when made, would naturally and in most cases,

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perhaps, necessarily tend to prove the truth of the charge, the defendant was thus absolutely precluded from making *any* defense, even by way of mitigating the damages, merely because he could not make a *full defense* to the *whole cause of action*; while the plaintiff was at liberty, in the same case, to introduce affirmative evidence, beyond that to be inferred from the false charge itself, to show a higher degree of malice for the purpose of enhancing the damages. Such was the case of *Thompson v. Bowers* in this state (1 Doug. 321), relied upon by the defendant in error. And this was in accordance with the settled rule of decision in several of the states, but certainly not in accordance with the principles of the common law. It was adopting one measure of right for the plaintiff, and another and a very different one for the defendant, or rather denying his right altogether by allowing the plaintiff to prove what the defendant was denied the right of controverting.

This was claimed to be the inevitable result of the severest logical deduction from the rule in *Underwood v. Parks*. And defendants must have been inclined to admit its severity, though they may have failed to discover a flaw in that logic which rendered it, to them, inevitable. Inexorable logic was vindicated, if not propitiated, by the sacrifice of defendants' rights.

Legal logic should be constructed upon principles at least akin to justice, the attainment of which should be its end and object; and by its tendency to this end its soundness should be tested. As the surveyor tests the correctness of the line in his front, by taking a back sight along the line he has run, the legal logician may often profit by pausing to test his logic by its results. Accidental evils, it is true, will sometimes result from the soundest rules devised by human wisdom, when applied to the peculiar facts of particular cases. But when the natural and ordinary tendency of a rule is *generally* and *systematically* to produce injustice, without any compensating benefit, the logic upon which it is supported may safely be suspected of a lurking fallacy somewhere.

Recoiling from the gross injustice of the rule when carried to the extent of excluding all evidence in mitigation which might tend to prove the truth of the charge, the English courts (especially in the later cases) and those of some of our sister states have held that facts and circumstances, though tending to prove the truth of the charge, may be received in mitigation, provided they fall short of establishing its truth. This, though better calculated for the pur-

poses of justice, has not been placed upon a very clear or well defined ground. It necessarily leaves it for the court to pass upon the weight of the evidence in deciding upon its admissibility. If all the hardships and injustice, which have thus arisen from the attempts to apply the rule in *Underwood v. Parks* to other cases, were the necessary result of the rule there adopted, I should, without hesitation, concur with SELDEN, J., in *Bush v. Prosser*, 11 N. Y. 357, etc., that the case should be entirely repudiated, as clearly in conflict with the principles of the common law, and subversive of justice. But the present case does not require us to go so far. And, in my view, the rule actually adopted and intended to be adopted in that case is not justly chargeable with all the injustice which has resulted from the attempts to apply it in other cases, but most of the evil consequences have resulted, not from the case itself, but from an unwarrantable extension and misapplication of the rule to cases not coming within its principle.

In that case the defendant's offer was to prove under the plea of not guilty, in mitigation of damages, *the truth of the words* charged as slanderous. This, if pleaded, would of itself have constituted a full justification or complete defense, when sustained by the proof. Such proof—that is, proof of a fact which, if pleaded, would constitute a full justification and bar to the action, it was held should not for the future be given even in mitigation, unless pleaded. And if the defendant believed himself prepared to prove the truth of the charge, there would seem to be no injustice in requiring him to plead it, so that the plaintiff might come prepared to meet it. The only hardship which could result to the defendant from this course, was one which did not arise so much from this rule itself, as from that anomalous rule which, in case of a failure to establish the plea to the satisfaction of the jury, made it conclusive evidence of malice, and aggravated the damages. To give the truth the *effect* of a full justification or bar to the action it was always necessary to plead it, though, up to the time of this case, it had been admissible in mitigation, under the general issue. This was the full extent of the change introduced by the new rule. It did not purport to extend to a case where the fact offered to be proved did not, *ipso facto*, constitute a full justification, if pleaded; but only to such as might have been pleaded in justification. The court were not guilty of the absurdity of requiring a defendant to plead mere matters of mitigation, not amounting to a full defense, and which could not

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therefore, on principles of law, be pleaded. Facts which might merely tend to prove the truth of the charge, or mere matter of evidence, could not be pleaded in justification, but the fact itself, the truth of the charge, must be directly and positively alleged. And this was *the fact* offered to be proved in that case. The rule adopted merely said to defendants, "If you are prepared to prove the truth of the words which, if pleaded, would constitute a justification, you must take the risk of pleading it, so that the plaintiff may not be taken by surprise on the trial." It is doubtless true that, within the spirit of the rule intended to be established by the case, the defendant would not be at liberty to introduce evidence tending to prove the truth of the charge *for the purpose of establishing its truth*.

But I am utterly unable to discover any thing in the case which would require the rejection of any evidence tending to show that defendant believed the truth of the charge when uttered, for the purpose of disproving malice and mitigating the damages; especially if offered in a manner and under circumstances amounting to a clear disclaimer of the right to insist upon the truth of the charge, or an admission that it was false in fact, though when made believed to be true.

The legal effect, as it seems to me, of the rule actually laid down by the court was substantially this: that under the general issue, without a plea of justification, the defendant should not be at liberty to insist upon the truth of the slanderous words; but the words being proved, the defendant, by omitting to plead the truth in justification, was to be considered as, in legal effect, admitting their falsehood. And, in this view of the case, the very offer of such evidence as last supposed, though its tendency might otherwise be to prove the truth of the charge, would (under the operation of this rule), when considered in connection with the neglect to plead in justification, constitute a clear and conclusive admission that the charge was false in fact, though at the time he made it he may have believed it to be true. But more especially, as it seems to me, would this be the case when the offer, in its very terms, shows that it is to be introduced only for the purpose of rebutting malice and mitigating the damages. Had this, which seems to me to have been the substantial legal effect of the rule in that case, been generally accepted as its true exposition, volumes of conflicting decisions and judicial controversy might have been avoided. But complete jus-

tice could not always be done to the defendant under the rule, so long as courts should adhere to the arbitrary rule that a plea or notice of justification not sustained by the proof was conclusive evidence of malice in aggravation of damages. But where this last rule has been abandoned, or, as in this state and many others, abolished by statute, I can see no hardship to the defendant, nor any difficulty in the way of a fair trial, likely to result from the rule in *Underwood v. Parks*, as I have endeavored to explain it. And the rule in that case, so far as it requires the defendant, if he intend to rely upon the truth of the charge in any way, to plead it, has been so long and so generally adopted, and the corresponding practice so thoroughly settled, that I see no satisfactory reason for disturbing the rule thus limited.

The evidence offered by the defendant in the present case on the two points already stated was expressly offered for the purpose of rebutting malice and to mitigate the damages, and for no other purpose. This offer, under the pleadings and in the manner thus made, must be treated as involving a disclaimer of the truth of the words, and a conclusive admission that they were not in fact true; but this in no way precludes the idea that the defendant, at the time, may have believed them to be true. And he had the right to introduce any facts and circumstances tending to show grounds for such belief at the time of the speaking of the words. This could not prejudice the plaintiff when accompanied with the admission that the charge was, nevertheless, untrue in fact. The evidence offered would, we think, have had a clear tendency to show such grounds of belief on the part of the defendant, and thereby tended to weaken or rebut the inference of malice otherwise to be drawn from the utterance of the false charge, and thus properly to lessen the amount of damages to be recovered.

This principle was fully admitted and applied by this court in *Farr v. Rasco*, 9 Mich. 353, which, in its reasoning (with which we are entirely satisfied), must be regarded as having thus far shaken the authority of *Thompson v. Bowers*.

But it is further objected that this evidence was inadmissible on another ground; that the defendant admits that the property of the horse referred to in making the slanderous charge was vested in the wife of the defendant and not in himself, and that the evidence offered would not have tended to show that defendant believed the plaintiff had stolen his horse as declared by the slanderous charge.

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We regard the objection, under the circumstances of this case, as more technical than sound or just. It might, perhaps, have had more weight if the defendant had attempted to justify. But there does not appear to have been any dispute that this was the same horse intended to be referred to by the defendant in making the charge; and it would be for the jury to find from the evidence whether this was so. The evidence of the replevin suit offered by the defendant would have shown that the horse must have been in the defendant's possession when replevied by the plaintiff and Green, and would, therefore, naturally be spoken of by the defendant, under such circumstances, as his horse.

Indeed, it would be very natural for any man who had merely borrowed or hired a horse for the time being, and from whom he should be taken, under circumstances which induced the belief that he was stolen, to say of the person who had taken the horse away, "He has stolen my horse;" quite as natural as to say, under the same circumstances, "He has stolen the horse of A. B." (the owner). And the malice of the charge, though it should prove to be false in fact, would not be likely to be the greater or less on account of the technical point of the actual right of property. And the relation of husband and wife, and the almost universal custom of using such property is common, either husband or wife speaking of it as his or her property, is not to be overlooked, and would be very proper for the consideration of a jury.

We think the evidence was erroneously rejected. The offer of the defendant to introduce the record of a criminal complaint made against the plaintiff and others by the wife of the defendant, for stealing the horse (which was described in the complaint as her property) and the proceedings under the same, showing that the plaintiff, with the other parties charged with the offense, was discharged on the evidence given on the part of the people before the justice, was, I think, properly rejected. Had the complaint been made by and on the oath of the defendant himself, instead of his wife, it is possible it might have had some tendency to show a belief on his part at the time that the charge was true. Upon this, however, we express no opinion. But not being made or sworn to by him, and the plaintiff having been discharged on the evidence given for the people, I can see no intelligible ground on which the evidence, if given, could have had any legitimate tendency to rebut malice or to mitigate damages.

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The judgment of the circuit court should be reversed with costs and a new trial awarded.

Reversed.

HOYT V. CITY OF SAGINAW.

(19 Mich. 36.)

Taxation for local improvements — Assessment of estates benefited.

The legislature may authorize a municipal corporation to assess the whole or any portion of the expenses of local improvements upon the property deemed to be particularly and specially benefited thereby, in proportion to the benefit received.

Where the charter of a city provides, that, whenever the common council shall deem any improvement in streets, etc., necessary, they shall so declare by resolution, such declaration must be made before the common council have authority to order the improvement.

APPEAL in chancery. The facts appear in the opinion.

John J. Wheeler, for complainant.

H. J. Brown, for defendant.

COOLEY, C. J. The bill in this case was filed to enjoin the collection of an assessment which had been made for the grading, ditching and planking of Genesee street, in the city of East Saginaw. It appears that the common council, by resolution, determined that the cost and expense of the improvement would be the sum of \$15,612, and that the property in the vicinity of the improvement would be benefited by it to the amount of \$11,700; and that they consequently assumed on behalf of the city the payment of \$3,912, and directed the sum of \$11,700 to be assessed upon the property in the vicinity which was particularly described in their resolution. The assessment was made accordingly, and the complainant, who was owner of a portion of the property described and assessed, seeks to enjoin the assessment on various grounds, which are particularly set out in his bill.

It is not disputed that the provisions of the charter are such as, if valid, will warrant this mode of apportioning and assessing the

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expense of such improvements; and on reference thereto it appears that they establish a basis for the assessment, and require it to be made, by commissioners appointed for the purpose, upon the several parcels of land in proportion to the benefit each shall be deemed to have acquired by the making of the improvement. It is claimed, however, that those provisions are in conflict with the constitution and void, because, as it is alleged, there is and can be under them no rule for the apportionment of the expense, inasmuch as the council, according to their own "whim, prejudice or judgment," determine upon what property the expense shall be levied, and "an irresponsible tribunal appointed for the particular case and no other" makes the assessment. To this position the cases of *Williams v. The Mayor, etc.*, 2 Mich. 560, and *Woodbridge v. Detroit*, 8 id. 274, are cited, neither of which, I think, will give it any countenance.

I have no doubt it is entirely competent for the legislature to authorize municipal incorporations to assess the whole or any portion of the expense of these local improvements upon the property deemed to be particularly and specially benefited thereby, in proportion to the benefit received, if, in the judgment of the legislature, that rule of apportionment is most just and equitable. There is nothing in the constitution which expressly prohibits it, and nothing in the nature of the power of taxation which is inconsistent with it. This mode of assessing such burdens has been repeatedly sustained by the courts of other states, and is supported by the reasoning of the court in the case of *Williams v. The Mayor, etc.*, and by that of the majority of the court in *Woodbridge v. Detroit*. I shall content myself, therefore, in this case, with a reference to those cases and to that of *Motz v. Detroit*, just decided.

Whatever may be the basis of apportionment for such a tax, a taxing district must necessarily be established; and the legislature in the charter before us have deemed it proper to empower the common council to judge what property is specially benefited by the improvement and define the taxing district accordingly. As the question in such case is one which can only properly and intelligently be decided upon personal inspection of the improvement and the manner in which it will affect the neighboring property, it is obvious that the legislature is not the proper authority to pass upon it, and the natural and proper course would seem to be to refer it to some local tribunal. If the legislature consider the common council the proper tribunal for this purpose, there is not only

no constitutional principle which precludes the question being referred to their judgment, but there is a manifest propriety in the reference. And the mode prescribed by the charter of apportioning the tax throughout the district which the common council have defined, in proportion to the benefit which the several parcels of land receive, as determined by impartial commissioners, is equally free from valid objection.

The charter not being found defective, it remains to be seen whether the city authorities have complied with its provisions in the various steps taken by them, and which are contested in this suit. Nearly every proceeding of the common council is attacked as irregular, illegal and void; but as we find ourselves compelled to hold that the first step in the proceedings, which must be the foundation of all the others, and without which the council would have no jurisdiction to proceed at all, was not taken in compliance with the charter, it does not seem to be important, and is not in accord with our usual practice, to consider the objections taken to the subsequent proceedings, all of which are rendered immaterial by the neglect to comply with the law in the preliminary action.

The charter of the city of East Saginaw provides, that "the common council shall have full power to lay out, establish, open, extend, widen, straighten, alter, close, fill in or grade, vacate or abolish, any highways, streets, avenues, lanes, alleys, public grounds or spaces in said city whenever they may deem it a necessary public improvement," and that, "whenever the common council shall deem any such improvement necessary, they shall so declare by resolution, which shall be drawn by the attorney of the corporation, and said resolution shall describe the contemplated improvement." Laws of 1869, p. 997, §§ 1, 2 of title 6. This is made by the charter a necessary preliminary to the ordering by the council of any of the public improvements here enumerated, or to the levying of any assessment therefor; and however unimportant may seem this declaration in particular cases, the council have no authority to dispense with it.

From the records of the common council, it appears that the first action in reference to this improvement was had on the eleventh day of June, 1866, when a petition of citizens was presented, asking for the grading, turnpiking and planking of Genesee street, from Jefferson street to the German Colony road; whereupon it was "*Resolved*, That the petition be received, and the improvement be

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ordered, the grading and turnpiking and one-half of the expense of planking to be paid by the property benefited, and the expense of one-half the planking to be paid by the city at large." On the same day and subsequently other resolutions regarding the improvement were adopted, more particularly ordering the improving, grading, ditching, turnpiking, draining and planking of Genesee street, between the points above mentioned, and prescribing the manner in which it should be done, and apportioning the amount of expense between the property benefited and the city at large; but there is no resolution entered upon the minutes of the council which, in the words of the charter, declares the improvement necessary, or comes any nearer such declaration than the one above quoted.

It may seem, perhaps, that the legislature have been over particular in requiring from the council an express preliminary declaration that they deem the improvement necessary, when the fact that they order it to be made is evidence that such is their opinion; and it has been argued in this case that the resolution of June 11, 1866, ought to be accepted as equivalent to the one made necessary by the charter, and as a sufficient compliance with the legislative requirement. It is evident, however, that if we hold this resolution sufficient, we also hold that the provision cited from the charter is idle, and is one a compliance with which may be dispensed with in any case. We have no authority to treat any part of a legislative enactment, which is not ambiguous in itself and is capable of reasonable application, as so far unimportant that it is matter of indifference whether it is complied with or not. We must suppose the legislature saw sufficient reason for its adoption, and meant it to have effect; and, whether the reason is apparent to our minds or not, we have no discretion to dispense with a compliance with the statute.

We can well conceive, however, that the legislature might suppose it possible that members of a city council could be induced to vote to direct a certain work to be done, when they would hesitate to say, upon their official oaths, that the work was actually necessary, if that was the specific question upon which they must record their opinion.

It is sometimes the case that some portion of the legislative enactment prescribing the course of proceeding to be pursued by public officers can be treated as directory, merely, and not mandatory; so that a failure in strict compliance will not defeat the

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whole proceeding; but this can never be the case where that which is required to be done is in the nature of a condition precedent to subsequent action, and not simply a step in the course of the proceedings prescribed with a view to a regular, orderly and prompt transaction of the business in the progress of which such step is to be taken. The courts, in their anxiety to sustain the action of public officers, where irregularities have occurred without the intervention of bad faith, have gone to the very extreme in holding legislative enactments to be merely directory, and have perhaps sometimes made decisions which dispensed with those things which the legislature intended as essentials. The duty of the courts is to examine the statute carefully, with a view to giving the legislative intention effect; and they ought to sustain defective proceedings only in those cases where it is fairly inferable that they observe that intent more nearly by sustaining them than by setting them aside on account of the omitted formality. Such inference is not admissible in reference to those things which are preliminary and jurisdictional.

It is evident, I think, that under the charter of East Saginaw, the declaration of the necessity for the improvement is a distinct act from and precedes the order that the improvement shall be made. It is the commencement of the proceeding, and is as indispensable to give the council jurisdiction as is process or the voluntary appearance of parties in civil actions to give jurisdiction to a court. It is the first of several steps, which, if duly and regularly taken, may result in fixing a lien upon the property of the citizen, and even in depriving him of it against his will. This step having never been taken, the whole proceeding is a nullity.

The formal objections which are taken by the defendants to the remedy the complainant has sought are all met by previous decisions of this court. *Palmer v. Rich*, 12 Mich. 414; *Scofield v. City of Lansing*, 17 id. 437. We think the circuit judge was right in decreeing a perpetual injunction, and the decree must be affirmed, with costs.

Decree affirmed.

NOTE. On the question of the authority of a legislature to authorize a municipal corporation to assess the expenses of local improvements on the estates benefited, see the elaborate opinion of Mr. Justice RUGGLES in *People v. Brooklyn*, 4 Comst. (N. Y.) 419, and cases cited. Also, *Hancock Street*, 6 Harris, 26; *Commonwealth v. Supervisors*, 29 Penn. St. 121; *Ochenley v. City of Allegheny*, 1 Casey, 123; *Sharpless v. City of Philadelphia*, 9 Harris, 147; *Nichols v. Bridgeport*, 23 Conn. 189; *Alexander v. Mayor of Baltimore*, 5 Gill. 383; *State v. Dean*, 8 Zab. 335; *Mayor v. Maberry*, 6 Humph. 308; *Lowell v. Hadley*, 8 Met. 180; *Lowell v. French*, 6 Cush. 223; *Morris v. Chicago*, 11 Ill. 650; *Williams v. Commack*, 27 Miss. 209. — REP.

Ellis v. Maxson.

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(19 Mich. 188.)

Foreign Law — presumption as to.

In the absence of evidence the presumption is that the laws of another state conform in substance to the general principles of the common law.

ACTION of assumpsit on a promissory note. The defense was, that the plaintiff had agreed to cancel and surrender the note in consideration that the defendant would convey to him land in the state of Illinois. Parol evidence of this contract was offered at the trial and objected to by plaintiff, on the ground that the contract was not in writing and therefore invalid. No evidence of the laws of Illinois was offered to show what was a valid contract for sale of land in that state. The objection was overruled, and the evidence admitted. The verdict was for defendant.

J. G. Pray, for plaintiff in error.

L. D. Dibble, for defendant in error.

CAMPBELL, J. The only error assigned in this cause is based upon the admission of parol proof of a contract for the sale of lands in the state of Illinois, there being no evidence to show what the law of that state required to make land contracts valid.

The evidence was properly admitted. A parol contract to sell lands was good at common law. It is only made void by statute. If we should make any presumption, in the absence of evidence, as to the provisions of any foreign laws, it would be that they conform in substance to the general principles of the common law. How universally we could make such a presumption it is not necessary to consider now. We certainly cannot presume that the legislature of another state has adopted all of our statutes, and therefore we must have proof before we can know that they have passed any statute. This question was decided in *Kermott v. Ayer*, 11 Mich. 181; see also, *Whitford v. The Panama R. R. Co.*, 23 N. Y. 465, 468.

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If the contract in question was required by the statutes of Illinois to be in writing, the statutes should have been introduced. *People v. Lambert*, 5 Mich. 349. In the absence of such proof, it was properly assumed to be valid.

The judgment must be affirmed, with costs.

Judgment affirmed.

EAST SAGINAW MANUFACTURING CO. V. CITY OF EAST SAGINAW.

(19 Mich. 269.)

Constitutional Law — Taxation — Exemption from by statute, not in nature of contract.

The legislature passed an act exempting from taxation all property used for the purpose of manufacturing salt, and offering a bounty of ten cents a bushel for salt manufactured in the state. Two years later the said act was amended, by limiting the exemption from taxation to five years. The five years having elapsed, the complainant, a corporation for the manufacture of salt, organized after the passage of the original act, filed a bill to restrain the collection of a tax upon their property, on the ground that the exemption from taxation was in the nature of a contract between the state and the parties acting under it, and therefore protected by the United States constitution. *Held*, that the act was not in the nature of a contract, and could be amended or repealed at any time.

THIS was a bill in equity for an injunction to restrain the defendant from collecting a tax. The facts appear in the opinion.

W. L. Webber, for complainant.

B. J. Brown, for defendant.

COOLEY, C. J. On the fifteenth day of February, 1859, the legislature of this state passed the following act:

"SECTION 1. The people of the state of Michigan enact: That all companies or corporations formed, or that may be formed, for the purpose of boring for and manufacturing salt in this state, and any and all individuals engaged or to be engaged in such manufacture, shall be entitled to the benefits of the provisions of this act.

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"SEC. 2. All property, real and personal, used for the purpose mentioned in the first section of this act shall be exempt from taxation for any purpose.

"SEC. 3. There shall be paid from the treasury of this state, as a bounty to any individual or company or corporation, the sum of ten cents for each and every bushel of salt manufactured by such individual, company or corporation, from water obtained by boring in this state; *provided*, that no such bounty shall be paid until such individual, company or corporation shall have at least five thousand bushels of salt manufactured."

On the fifteenth day of March, 1861, the foregoing act was amended as follows: The first section, by adding a proviso limiting its benefits to those who should be actually engaged in such manufacture prior to the first day of August, 1861. The second section, by limiting the exemption from taxation to five years from the organization of the company or corporation. And the third section, among other things, by limiting the bounty moneys that should be paid to any one individual, company or corporation, to the sum of one thousand dollars.

The East Saginaw Salt Manufacturing Company filed its bill in chancery in January, 1868, setting forth therein that its associates, in the month of April, 1859, became a corporation under the general law of the state authorizing the incorporation of companies for mining and manufacturing purposes; that in June of that year they commenced boring for salt near the Saginaw river, in the county of Saginaw, and continued their operations until early in the year 1860, when brine was found of sufficient strength and purity to warrant the company to proceed in the manufacture of salt; that relying in good faith upon the benefits promised in said act of 1859, the complainant proceeded at once to erect works for such manufacture, and to enter upon that business, and by the ninth day of March, 1861, had actually manufactured from the water of said well six thousand three hundred and forty-eight barrels of salt, each containing five bushels; and that, in consequence of the facts above stated, the property of complainant used for the purpose of boring for and manufacturing salt is exempt from taxation, and the right to such exemption is a vested right, which it is not competent for the legislature to take away without complainant's assent.

The bill further avers that complainant is still engaged in the manufacture of salt at the place aforesaid, and is employing all its

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property for the purpose ; that it is the owner of certain real estate particularly described in the bill, of the value of \$20,000 ; that such real estate is situate within the city of East Saginaw, and that the authorities have levied a tax upon the same for the year 1867, amounting to the sum of eleven hundred and forty-five dollars and four cents, which is a cloud upon the title of complainant, and which the city marshal threatens to proceed to collect. And the bill prays a perpetual injunction against such city and the city marshal to restrain the collection. To this bill there was a demurrer, and the questions before us are those the demurrer presents.

It will be seen from this brief abstract of the bill that it is not claimed by complainant that the particular property on which the tax in question was levied was purchased in reliance upon the act of 1859, or that the same or any part thereof was employed in the manufacture of salt, or was owned by complainant previous to the amendatory act of 1861. The claim of the bill appears to be this: The complainant engaged in the manufacture of salt while the act of 1859 was in force, and had produced sufficient to earn a money bounty under that act before its amendment; it thereby acquired a vested right, which the legislature could neither take away nor abridge, to have all the property of this corporation employed in this business perpetually exempt from taxation for any purpose whatsoever. On any claim less broad than this, it is evident the present bill could not be sustained.

It cannot fail to strike the mind, when this claim is put forth that the most serious and alarming consequences may flow from it, should it receive the sanction of the courts. The demand of exemption is made under that clause of the constitution of the United States which forbids the states to pass any laws violating the obligation of contracts ; and the argument is, that the corporation, by accepting the offer which the state made to those who should engage in the development of its resources, in salt, and by actually obtaining a productive well, has thereby entered into a contract with the state, by which, in consideration of continued manufacture, the state for all time so ties up its hands as to preclude the exercise of the power of taxation in regard to all property which complainant may employ in the business.

Now, it has been too often remarked by the courts to render it important for us to enlarge upon it here, that the power of taxation is one of the essential powers of sovereignty, which the state must

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exercise again and again, as often as its needs or its interests may require; and one that cannot in the least be crippled or abridged, without to that extent crippling the state, impairing its vitality, and in some degree endangering its existence. It is upon this ground that it has been so often and so earnestly denied by learned and able jurists, that it is within the grant of authority to any legislative body, chosen as representatives of the people, to enter into any contract, by which they bargain away any portion of the power to levy taxes for the needs of government. For the representatives of the people do not receive the powers of government for any purposes of sale or grant, but they take them in trust for a brief period, to be employed for the general welfare, within such limits as the people may have prescribed, and under obligations to transmit them unimpaired to their successors.

It may not be unimportant to examine somewhat more in detail the consequences that may fairly be anticipated from accepting the position which is taken by the complainant in this case. The act of 1859, it will be perceived, is not in express terms made perpetual, nor do we discover in it any words which indicate a legislative intent that it shall be irrevocable. It is perpetual in the same sense in which all statutes are, which prescribe a rule of action without limiting the term of its continuance; but it is neither necessary nor usual to reserve the right of repeal in order that the legislature may possess full power to do so, and complete authority to abolish the rule whenever the varying interests of the state shall appear to that body to render such action important. The absence of any express reservation of the right to repeal, or of any limitation in time, is not, therefore, a fact of any significance in this connection, since in this particular the statute is not unlike the ordinary legislation of the state, in regard to which the idea of contract between the state and the people whose interests it affects is never suggested.

The act of 1859 is clearly, in its nature and purpose, a bounty law and nothing else. For the encouragement of the manufacture of salt, it promises an exemption from taxation, and the payment of a sum of money for each bushel of salt produced after the quantity shall have reached a certain prescribed limit. When a bounty is earned, it becomes a vested right, and we fully agree with the former decision of this court in *People v. Board of State Auditors*, 9 Mich. 327, that the party earning it cannot then be deprived of the right. But when is a bounty earned? Not, certainly, as

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soon as the party has made his arrangements for earning it. He may have abandoned some other business with that object in view; he may have made large investments in preparation for accepting the condition of the proffered bounty; the changes he makes in his affairs, in reliance upon the promise of the state, may be so great as to expose him to ruin if the offer be withdrawn, but until the condition is fully performed, no one will pretend that the state may not withdraw the offer, and expose his interests to these serious consequences. Whatever there may be in his case to render the withdrawal inequitable and unjust may appeal with more or less force to the legislature against so harsh a measure, but the equity of his case will not constitute a legal impediment to the legislative action. Like all other citizens who make their arrangements in reliance upon the continued existence of the laws as they are, he takes upon himself the risk of their being changed, and the state incurs no responsibility in consequence of the change proving injurious to his private interests. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Turnpike Co. v. State*, 3 Wal. 210; *Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Goshen v. Richmond*, 4 Allen, 460; *Bridgewater v. Plymouth*, 97 Mass. 390.

The money bounty on each bushel of salt above the required quantity was earned when that bushel was made, and not before. The repeal of the bounty law, therefore, absolves the state from all legal obligation to pay the bounty upon any that shall be manufactured afterward. The fact that large investments will thereby be rendered unproductive cannot preclude the repeal. We are not aware that this position has ever been disputed, though the money bounty was long ago wholly discontinued, and this corporation has ever since been largely interested to dispute the right of the state to stop it, if to do so could be of any avail.

The bounty that is to be given by way of exemption from taxation does not, so far as we can discover, rest upon any different basis. The state promises not to tax; but this means only that it will not tax so long as the promise is a continuing one, and the condition on which it is made is performed. Those who pursue the manufacture until the promise is recalled have earned the exemption to that time, but they have earned nothing more. For protection against loss from its recall they must appeal to the generosity of the legislature, and its sense of right and justice.

If this be not so, then the early repeal of the bounty law has alone

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saved the state from having all the property employed in one of its most extensive manufactures forever exempted from all the burdens which every other business must bear in the support of the government and the preservation of public order. But the evil might not stop here, and would be very certain not to do so. The people of this state at the present time are being pressed with arguments to demonstrate the necessity of railroad improvements, and the great and urgent importance of individuals and communities lending them their aid. There are not wanting plausible arguments in favor of exempting all such improvements from state and local taxation, in consideration of the benefits they confer upon the state, in extending settlement, enhancing the value of lands, and increasing the facilities for commerce and travel. So great a boon as a perpetual exemption from taxation is one for which this interest might afford to labor earnestly and persistently, and, if the incidents of an irrepealable contract can be discovered in the law before us, he would be no vain alarmist who should confidently predict the speedy coming of the time when millions of property of this description would be found forever exempt from taxation, under improvident and hasty legislation, passed under the specious pretense of encouraging struggling enterprise.

Railroads, however, are not the only investments that appeal to the fostering care of our citizens. There are many among us who think all that is necessary to render the state wealthy and prosperous is to introduce extensive manufactures, so that the raw material we produce shall be worked up at our doors. There are others who think that the great need of the state is people to penetrate its forests and bring its wild lands under cultivation. There are still others who believe the mining interests require special attention and encouragement. It is not too much to suppose that sometimes the one view and sometimes the other will be paramount in the legislature, and influence the levying of taxes. And if one class after another can secure a perpetual exemption from taxation, on the pretense of necessary encouragement, in the periods of uncertainty and embarrassment, we might at length have the leading interests of the state enjoying the benefits of protection and government, while the other members of community are compelled to bear its burdens.

Nor is it very apparent that the citizen who engages in banking when the law imposes a specific tax on the capital employed in that

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business may not with equal reason claim that the state contracts with him never to increase that tax. He makes his arrangements and investments in view of what the law then is, and it may be quite as inequitable, and quite as pregnant of injurious consequences, to increase the rate of taxation, so as possibly to render his business unprofitable, as it was to repeal the proffered bounty in the present case. The circumstances may appeal to the justice of the legislature with equal force. Church organizations and literary institutions and societies, whose property is now exempt from taxation, might claim perpetual exemption in still closer analogy to the present case; for it cannot be disputed that their exemption is granted in order to encourage religion and learning, and has for its object the general welfare, as much as the bounty which was held out as an inducement to the manufacture of salt. Lands are purchased and buildings erected in reliance upon the exemption, and reasonable expectations are disappointed when it is taken away. There are all the circumstances necessary to constitute a contract with the state in such a case, if one can exist in the one before us. In this connection we refer to what it is said in *Brainard v. Colchester*, 31 Conn. 409, with full approval.

In questioning the act of 1859, in order to determine whether the exemption it promises is perpetual or not, we must not forget that the promise and obligation, whatever it is, is on the side of the state only. Those who accept the bounty promise nothing, and bind themselves to nothing. However much it may be for the interest of the state that they should continue in the manufacture, they are not obliged to do so, but may abandon it at any time. Their acceptance, therefore, is only during their own good pleasure, and while they shall continue to find it for their interest. This fact alone, if this were merely an ordinary contract between man and man, would go far to raise very serious doubts whether it was intended to be an arrangement more permanent than at the will of either party, and whether one had not the same right to terminate it at any time which was possessed, without question, by the other.

Nor, on the question of proper construction, must we fail to bear in mind what the subject of the statute was. It respected the taxing power of the state, and is claimed to constitute an agreement not to employ it in a certain class of cases for all future time. To use the words of Mr. Justice CAMPBELL in *Christ Church v. Philadelphia*, 24 How. 302, in speaking of a law exempting property from

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taxation: It "belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the legislature. All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society." But they do not, therefore, as he very clearly points out, become irrevocable laws. Chief Justice MARSHALL has said, in speaking of the taxing power, that as the whole community is interested in retaining it undiminished, its abandonment ought not to be presumed in a case in which the deliberate purpose to abandon it does not appear. *Providence Bank v. Billings*, 4 Pet. 561. The supreme court of Pennsylvania adopted the same rule of construction when they declared that if such an exemption from taxation exists, "it must be the result of a deliberate intention to relinquish this prerogative of sovereignty, distinctly manifested." *Easton Bank v. The Commonwealth*, 10 Penn. St. 450. To the same effect are *People v. Mayor, etc., of New York*, 32 Barb. 113; *Illinois and Mich. Canal v. C. & R. I. R. Co.*, 14 Ill. 321. We also quote from the opinion of Mr. Justice SWAYNE, in the case of *Gilman v. Sheboygan*, 2 Black, 513. "The imposition, modification and removal of taxes," he says, "and the exemption of property from such burdens, is an ordinary exercise of the power of state sovereignty. There is no pledge, expressed or implied, that this power should not thereafter be exercised. Admitting that the state *could* enter into such an engagement, there is no evidence (in the case at bar) that it did. This fact should never be assumed unless the language used be too clear to admit of doubt." "Too plain to be mistaken," are the words of Chief Justice TANEY in speaking on the same subject, in *Ohio L. Ins. & T. Co. v. Debolt*, 16 How. 435. Such a rule of construction is eminently wise and reasonable, and if a different rule prevailed, and every careless and every corrupt act of legislation, which scheming individuals or powerful interests might secure in their own favor, were to be instantaneously clothed with the attributes of contracts of an irrevocable character, by virtue of the constitution of the United States, and thus acquire a force and permanence which the parliament of England, with all its boasted omnipotence, could never give to its acts; and if the courts, whether it accorded with their sense of right and justice or not, were then compelled to encourage such legislation by enforcing it, in defiance of the law-making power itself, in favor of those who had been artful enough to secure it, the question

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might be presented in the most serious and forcible aspect to the American people, whether the clause of their national constitution inhibiting the violation of the obligation of contracts was not, as expounded and enforced, productive of more evil, injustice and corruption, than could reasonably be anticipated from leaving the legislatures of the states as much untrameled in this particular as are the legislative bodies of free states generally.

We are aware that it is not usually a logical mode of argument to endeavor to demonstrate the non-existence of a power by pointing out its liability to abuse; but, in questions relating to sovereign powers, it has often been recognized as both legitimate and cogent. Chief Justice MARSHALL, in the leading case of *McCulloch v. Maryland*, 4 Wheat. 316, rested his argument against the power of the states to tax the agencies of the general government, to a considerable extent, upon the illimitable nature of this power where it existed, and the possibility that the states, if they could tax the agencies of the general government at all, might so exercise that authority as practically to annihilate them, and thus endanger the existence and perpetuity of the union itself. He wholly repudiated the idea that confidence in the good faith of the state governments must forbid our indulging in the anticipation of such consequences. Similar considerations have led the state courts to deny to the general government the power to tax the instruments through which the state sovereignty is exercised. *Warren v. Paul*, 22 Ind. 279; *Jones v. Keep's Estate*, 19 Wis. 369; *Fifield v. Close*, 15 Mich. 505; *Union Bank v. Hill*, 3 Coldw. 325; *Smith v. Short*, 40 Ala. 385. And we are not aware that the proper authorities of the general government have ever questioned the correctness of these decisions, and taken the necessary steps to secure their review. In those cases in which the power of a state by contract, to abridge or restrict any of the essential powers of sovereignty has been denied or questioned, stress has been laid upon the great and imminent liability to abuse if the power exists at all. *Brewster v. Hough*, 10 N. H. 143; *Piscataqua Bridge v. N. H. Bridge*, 7 id. 69; *Backus v. Lebanon*, 11 id. 24; *Mechanics and Traders' Bank v. Debolt*, 1 Ohio (N. S.), 594; *Toledo Bank v. Bond*, id. 622; *Knoup v. Piqua Bank*, id. 603; *M. & R. Plank Road Co. v. Husted*, 3 id. 578; *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 140; *Brainard v. Town of Colchester*, 31 Conn. 410; *Mott v. Penn. R. R. Co.*, 30 Penn. St. 9. Upon the like considerations it is now held, that, although a state grants a privilege in exclusive

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terms, it does not thereby bind its hands against such an exercise of the right of eminent domain as may annihilate the franchise for the benefit of another which the terms of the first would exclude. *West River Bridge Co. v. Dix*, 16 Vt. 446; *Same Case in Error*, 6 How. 507; *Enfield Toll Bridge Co. v. Hartford and N. H. R. R. Co.*, 17 Conn. 40, 454; *Matter of Kerr*, 42 Barb. 119. We refer also to the cases in which the right to exercise the police power has been asserted, notwithstanding grants inconsistent therewith. *Brick Church v. Mayor, etc., of N. Y.*, 5 Cow. 538; *Vanderbilt v. Adams*, 7 id. 349; *Thorpe v. R. & B. R. R. Co.*, 27 Vt. 149; *Indianapolis, etc., R. R. Co. v. Kercheval*, 16 Ind. 84; *Ohio, etc., R. R. Co. v. McClelland*, 25 Ill. 140; *State v. Noyes*, 47 Me. 189; *Hirn v. State*, 1 Ohio (N. S.), 15; *Caldler v. Kurby*, 5 Gray, 597; *Adams v. Hackel*, 7 Fost. 294.

It is said, however, that the doctrine of some of these cases is opposed to that declared by the supreme court of the United States, which, upon all questions arising under the constitution of the United States, must be the final and authoritative arbiter. Some of the cases decided by that court are specially referred to as having finally and in the most conclusive manner settled the questions before us in the case at bar. We have looked into those cases, however, without finding in any of them any thing to weaken the positions we have already assumed. It is not very clear that the supreme court of the United States has ever, at any time, expressly declared the right of a state to grant away the sovereign power of taxation. The leading case of *New Jersey v. Wilson*, 7 Cranch, 164, may well be referred to as an exercise of the treaty-making power, and therefore rests upon different considerations from those which surround the ordinary exercise of legislative authority. There are indeed several cases in which it has been held that a state may irrevocably limit itself to a particular rate of taxation only. *Gordon v. Appeal Tax Court*, 3 How. 133; *Piqua Bank v. Knoop*, 16 id. 369; *Ohio L. & T. Company v. Debolt*, id. 416; *Dodge v. Woolsey*, 18 id. 331; *M. & T. Bank v. Debolt*, id. 380; *M. & T. Bank v. Thomas*, id. 384. It is to be observed of all these cases, however, that the exemption which the court sustained did not rest upon any mere implication to be derived from an ordinary act of legislation, but was express in its terms, and was embodied in charter contracts so as to be supposed irrevocable under the principles announced in the Dartmouth College case. The counsel for this complainant has expressly disclaimed

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the suggestion that the act of 1859 can be regarded as an amendment of complainant's charter, or that the rights of complainant rest upon any other or different basis from those of any individual who may have commenced the manufacture of salt before the bounty law was amended. There is, therefore, no question of the inviolability of charter contracts before us. Moreover, in considering the bank-tax cases above referred to, it must be borne in mind that the stipulations there involved were not for complete exemption from taxation, but for restriction to a particular mode and rate only. It is easy to perceive that there may be a difference in principle between a complete exemption from a necessary burden of government, and an agreement that the burden shall be laid and borne in a particular manner only. Mr. Justice McLEAN has hinted at this distinction in *Piqua Bank v. Knoop*, 16 How. 389. Referring to the argument that the state cannot barter away any part of its sovereignty, he says: "No one ever contended that it could. A state, in granting privileges to a bank, with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose, of which it is the exclusive judge. Under such circumstances a contract made for a specific tax, as in the case before us, is binding. This tax continues, although all other banks should be exempted from taxation. Having the power to make the contract, and rights becoming vested under it, it can no more be disregarded nor set aside by a subsequent legislature than a grant for land. This act, so far from parting with any portion of sovereignty, is an exercise of it. Can any one deny this power to the legislature? Has it not a right to select the objects of taxation, and determine the amount? To deny either of these is to take away state sovereignty."

It might not be improper to refer to still more significant remarks by the dissenting judges in the case last referred to, but that we desire to preclude the possibility of our opinion being thought to imply the impugning in any degree the correctness of the views of the majority of the court in the bank-tax cases in 16th and 18th Howard. The case before us does not bring them into controversy, and if it did, we should of course accept them as conclusive. The present case stands upon a different footing altogether. There is no charter contract involved here, and no stipulation by way of commutation for a tax. The case, nakedly stated, is one where an offered bounty is sought to be raised by the force of mere implica-

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tions to the dignity of an irrevocable contract. When the courts are asked to enforce the offer as a contract, they are asked to give to the legislative act a meaning and a purpose which was never within the contemplation of the men who passed it. We cannot make contracts for persons or for states who never contemplated them themselves. If a state legislature possesses the power to implant the seeds of dissolution in the body politic, by granting away the right of taxation by way of bounties, we are not to be astute in discovering an intent to do so in the general language employed in what appears to be an ordinary act of legislation. On this subject we refer further to *Herrick v. Randolph*, 13 Vt. 531; *Commonwealth v. Bird*, 12 Mass. 443, and *Dale v. The Governor*, 3 Stew. 387, in all of which an exemption from a public burden, in general terms like the present, was held not to be perpetual, but during the pleasure of the legislature only. We also refer to what is said in *Charles River Bridge v. Warren Bridge*, 11 Pet. 544.

It may be proper in this connection to notice one other case which is pressed upon us as analogous to the present. In *McGee v. Mathis*, 4 Wal. 143, it appeared that swamp lands had been granted by the United States to the state of Arkansas, the proceeds of which, by the terms of the grant, were to be applied to the drainage of the lands. The state, in order to promote their drainage and sale, passed an act, by way of encouraging purchasers, that the lands should be exempt from taxation for the term of ten years, and issued transferable scrip receivable in payment for them. A repeal of the act, so as to affect either the land sold or the scrip previously issued, was held unconstitutional. We do not doubt, in the least, the correctness of this decision. The legislative act was a step in performance of the condition attached to the congressional grant, and the lands had never become a part of the taxable property of the state except subject to the performance of the condition. To hold that the state could take the lands, sell them as a means of performing the condition, and then claim an indefeasible right to tax them under such circumstances as would amount to a repudiation of the condition, would be to take broader positions than any which have been advanced in any of the cases we have cited. We discover no analogy between that case and the one before us.

We do not deem it necessary for us to go beyond the decisions of the supreme court of the United States to find authority for sustaining this tax. The case of *Christ Church v. Philadelphia*, 24

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How. 300, is, in our opinion, entirely analogous in its legal bearings to the present case. It there appeared that the legislature of Pennsylvania, in 1833, had provided by special act that "The real property, including ground rents, now belonging and payable to Christ church hospital in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes." The inducement to this legislation was stated in the same act to be, the corporation "having for many years afforded an asylum to numerous poor and distressed widows, who would probably else have become a public charge;" and it being represented that "in consequence of the decay of the buildings of the hospital estate and the increasing burden of taxes, its means are curtailed and its usefulness limited." Notwithstanding the words of perpetuity employed in the act, the legislature, some eighteen years afterward, took away the exemption as to some portion of the property, and were sustained by the supreme court of the state in so doing. On error to the supreme court of the United States, the judgment was affirmed. Mr. Justice CAMPBELL, delivering the opinion of the court, says: "The inducements that moved the legislature to concede the favor contained in the act of 1833 are special, and were probably temporary in their operation. The usefulness of the corporation had been curtailed in consequence of the decay of their buildings and the burden of taxes. It may be supposed that in eighteen years the buildings would be renovated, and that the corporation would be able afterward to sustain some share of the taxation of the state. The act of 1851 embodies the sense of the legislature to that effect. It is in the nature of such a privilege as the act of 1833 confers, that it exists from *bono placitum*, and may be revoked at the pleasure of the sovereign."

Now, although in that case the purpose of the act was not distinctly declared to be to induce the corporation to expend moneys in the way of improvements, yet it is evident that such expenditure was not only within the contemplation of the legislature, but it was also expected that the public would in the future receive a benefit from the improvements, as it had already from the buildings which had gone to decay. The purpose of the act was, therefore, to encourage an expenditure for a public purpose, which is all that can be urged in favor of the inviolability of the act now in question. We say here, in the language of Mr. Justice CAMPBELL, above quoted, that the inducements to the act of 1859 were special and

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temporary in their operation; and it may well be supposed that at the expiration of the time limited by the act of 1861, the persons engaged in the manufacture of salt would have surmounted the difficulties attending the establishment of a new business, and become able to sustain some share of the taxation of the state. The act of 1861 embodies the sense of the legislature to this effect.

This review leads us irresistibly to the conclusion that there is nothing in principle and nothing in the adjudged cases which requires us to hold that the act of 1859 constituted a contract between the state and those who, before its amendment, accepted the bounty it offered. We are also satisfied, that to form such a contract was never the legislative intention. And upon formal grounds, also, we think the complainant must fail, because the bill does not affirmatively show that the property upon which the tax was levied belonged to complainant, and was employed in the manufacture of salt before the promise of bounty was recalled. It is consistent with all its allegations that the corporation may have become the owner of this property, not only after the act of 1861 was passed, but after the five years specified in that act had expired. And if such were the case, it would be idle to pretend that the investment was made in reliance upon the act of 1859.

The decree of the court of chancery, we think, was erroneous, and must be reversed, and the bill dismissed, with costs of both courts. *

Reversed.

 WILLIAMS v. THE ALBANY CITY INSURANCE COMPANY.

(19 Mich. 451.)

Fire Insurance — Condition in Policy — Non-Payment of premium note

A policy, the premium for which had been paid by note, contained a provision that in case the note should not be paid at maturity, the full amount of the premium should be considered as earned, and the policy become void while said past due notes remained over-due and unpaid; a loss occurred after the maturity of the note and before it was paid. *Held*, that the company was not liable for any loss which occurred during the continuance of the default, but that, on the subsequent payment of the note, the policy revived and was in force from the date of such payment.

* See the very able and elaborate opinion of Judge PORTER, in *People v. Roper*, 25 N. Y. 629.

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ACTION of assumpsit on a policy of insurance.

Alfred Russell, for plaintiff

Newberry, Pond & Brown, for defendant.

CHRISTIANCY, J. This is a case made after judgment in favor of the defendant, in the circuit court, for the county of Wayne.

The action was assumpsit upon a policy of insurance upon the schooner *Stanley L. Noble*, dated April 27, 1868, insuring the vessel from that date until the 30th day of November in the same year; the declaration alleging a total loss within that period.

The premium was not paid in cash, but an indorsed note was given for it at six months.

The policy contained an express stipulation that "in case the notes or obligations given for the premium, or any part thereof, be not paid at maturity, the full amount of premium shall be considered as earned, and this policy becomes void, while said past due notes or obligations, or any part thereof, remain overdue and unpaid," and a memorandum to the same effect was contained on the face, but at the foot of, the note.

The note given was not paid at maturity, and was duly protested for non-payment, so that the indorsers, who are shown to have been good, were legally bound to pay the note.

On the 12th day of November, after the note had become due and while it remained over-due and unpaid, the vessel was totally lost, the loss exceeding the amount insured, and the plaintiff's interest being undisputed.

On the 19th day of November—after the loss and after the defendants' agent had notice of it through the newspapers—the indorsers paid the note with interest and expenses to said agent, who received it and delivered up the note to the indorsers. The agent transmitted the money to the defendants who received and kept it.

The defendants refused to pay the loss, and in this suit defend, on the ground that, by the express provision of the policy, they were exempt from liability for any loss occurring while said note was overdue and unpaid.

Upon this statement of facts, three questions arise: 1st. What is the true interpretation of this provision of the policy? 2d. When properly interpreted, is it valid in law? and, if so, 3d. What was

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the effect of the defendants' receiving payment of the note, after default and after the loss?

First. As to the interpretation: Was it the intention that the policy should become utterly and finally extinguished on failure to pay the note at maturity? If the provision had stopped with the clause "and this policy becomes void," such would have been the true interpretation. But the whole instrument, and especially the whole provision upon the same identical subject, must be construed together to ascertain the intent; and the clause last cited is but a part of one entire provision, but one branch or member of the same compound sentence, and is immediately followed by the qualifying clause, showing just how long the policy is to be void by reason of the default; "*while said past due notes or obligations or any part thereof shall remain overdue and unpaid.*" This shows just as clearly the intent to limit the period during which the policy shall be void as the previous words do to make it void at all or for any period or purpose. In other words, it shows that, notwithstanding the use of the term "void," the intention clearly was only to suspend its operation as a policy while the note or obligation should remain overdue and unpaid, and that upon payment, after default, the policy should again take effect from the time of the payment and continue for the remainder of the period originally fixed; and that, by reason of such default, it should only become wholly void, or cease to be capable of revival as a policy, in case that default should continue to the end of the period first fixed for the insurance. The provision, therefore, is but a stipulation, in another form of words, that the company shall not be liable for any loss which may occur during the continuance of the default.

In connection with this and as a necessary part of the provision, without which it could not have full effect, it was also stipulated that, in case of such default, the full amount of premium should be considered as earned. But this, it is quite evident, does not mean that the premium should, in all cases, be considered as fully earned at the date of the default, but was intended to have this full effect, only in case the policy should not be restored, and the risk revived for the future by payment after default, and within the period originally fixed.

And when the policy should be thus restored and the risk revived, the premium would cover this latter period of risk also; and this period would constitute a part of the time during which the pre-

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mium was being earned. The premium was, I think, evidently intended to be earned by the risk, and the period within which it should be earned was intended to be exactly commensurate with the period or periods during which the risk should be covered by the policy. This renders the whole provision on the subject of default and its consequences sensible and harmonious. Any other construction would be repugnant to that portion of the provision limiting the time within which the policy should be void, of which it forms an essential part.

Such being the true interpretation of this provision of the contract, the next question is upon its validity. And I confess my entire inability to discover any ground upon which its validity can be questioned. It was certainly competent for the parties to make their own contract, and to fix for themselves all its terms and conditions, unless there was something illegal or opposed to public policy either in the consideration or in what was agreed to be done. Where is the law, and what is the principle of public policy, which this provision tends in any way to violate or impair? I am aware of none.

The competency of the parties to have agreed upon a higher rate of premium, or for the same amount of premium for a shorter period of time, cannot be doubted. And upon the same principle it must have been equally competent to agree that the period of time to be covered by the insurance, and for which the stipulated amount of premium should be paid, might be made shorter upon any contingency the parties saw fit to agree upon, without altering the amount of the premium, especially upon any contingency which the insured had it in their own power to prevent, and which it was their moral and legal duty to prevent. If, therefore, the provision had been that in case of default in payment of the premium at the end of the six months the policy should from that moment become utterly extinguished, or, what is the same thing, that the period of the risk should absolutely end then, and yet the whole amount of premium should be paid, I am inclined to think the provision would have been entirely valid. But here the provision is not that the period of insurance shall finally terminate on the default; but that the default shall only suspend the policy and the risk during the continuance of the default, and that upon payment after default, and within the period for insurance originally contemplated, the policy and the risk should revive, and the period of the insurance again

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proceed for the balance of the time remaining after such payment. And, so far from seeing any reason to doubt the validity of the provision, I am unable to see any thing unfair or unreasonable in it. It seems to me no more than fair and reciprocal, that, while the insured continues in his violation of the contract to pay, the insurer should not be bound by his, to sustain the risk, when the parties have so deliberately agreed, and when the insured has it in his power at any moment, by simply performing his own duty, to make the insurer resume the risk for the future; and when it must be presumed that the amount of premium was fixed with reference to these provisions. If the contingency provided for, which should operate as a suspension of the risk, was one over which the insured had no control, there might be more reason to say the insurer should return the amount of the premium applicable to the period of suspension. But any claim for the return of this portion of the premium, applicable to the period of suspension, must rest upon the default of the insured; their violation of their clear legal duty. Could they sustain such a claim upon such a ground?

Perhaps the nature of the provision and of the principle involved may be more easily understood by illustration. A., the owner of a vessel, applies to B., an insurer, for insurance upon his vessel for seven months. He is not prepared to pay the premium in cash, but offers to give his note, with an indorser, at six months. B. replies, "I would be willing to insure your vessel for the seven months, at nine per cent, and give six months credit for the premium, if I could rely with entire certainty upon the payment of the proposed note at maturity. But experience has shown that notes, even of responsible parties, are not always paid at maturity, and much embarrassment often arises from the delay. I must rely upon my premiums to pay my losses; and it is very essential that I should be able to calculate with some certainty the amount I can rely upon at any particular time. The contract of insurance is one which relates to, and is based upon, a calculation of risks; and when I give credit for the premium, I must not only calculate the hazards of the property insured, but the risk of the non-payment of the premium, not only of its final payment, but of its prompt payment at the time agreed upon, and of the embarrassment which may arise from delay. I would not take the note you propose at all if I did not believe it would be promptly paid. But it may not be. I will

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take your indorsed note for the nine per cent premium, and insure your vessel for six months; that is, till the maturity of the note; and, if promptly paid, the period of insurance shall be seven months; in other words, I will insure the vessel for six months at my own risk of being able to obtain payment upon the note, with the option on your part of having the period of insurance extended for another month, that option to be manifested by prompt payment of the note at maturity." To this A. replies: "I intend to pay my note when due. It is possible I may fail to meet it exactly at the day; but if you will allow me, in case I should fail at the day, to pay as soon as I may choose, and thereby to restore the insurance after such payment, for the balance of the period then remaining, thus only suspending the policy and throwing on me the risk only of such losses as may occur during my default, this will be more reasonable, and will leave it in my own power and make it my interest to increase the period of insurance, and thus, in effect, make the rate less. I will, therefore, consent to your proposition, thus modified." B. thereupon accepts the modification, and the policy is drawn and issued with the proposition thus modified inserted as a part of its terms, and the note given and received accordingly.

This supposed contract is identical in principle with that before us. And unless insurers, because they are in that business, are under some legal obligation to insure upon terms which may be desired by others, though not satisfactory to themselves, I can see nothing unfair or unreasonable in such a contract, nor any reason why it should be forbidden by the law. And I am aware of no law or any principle of public policy which it tends to violate. Contracts, identical in principle with that before us, have been treated as valid by the highest court in the state of New York, and I think them unobjectionable. See *Wall v. Ins. Co.*, 36 N. Y. 157; and *Reed v. Ins. Co.*, not yet reported, but a copy of which was read upon the argument.

If I am right in the views I have already taken of the nature and validity of the contract, the acceptance of payment of the note in no way affects the right of the parties in this suit. It was no waiver of any of the rights of the defendants, as they were entitled to its full payment in any event and in any aspect of the case.

As this disposes of the case and shows that the plaintiffs were

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not entitled to recover, upon the facts stated, it becomes unnecessary to consider the other points discussed upon the argument.

The judgment of the circuit court in favor of the defendant must be affirmed, with costs.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

DU LAURANS V. THE FIRST DIVISION OF THE ST. PAUL AND
PACIFIC RAILROAD COMPANY, appellant.

(15 Minn. 40.)

Railroad Company — Right to demand extra fare when paid in cars.

By the regulations of defendants, a railroad company, persons taking passage in their cars, at a place where a ticket office was established, without having first procured a ticket, were charged ten cents in addition to the regular fare. The plaintiff, finding the ticket office closed, entered the cars without a ticket, intending to go to M.; made known to the conductor his destination, and gave him fifty cents, which was the regular fare; the conductor demanded the additional ten cents, which was refused, and the plaintiff was expelled at J., the car fare to which was fifty cents. *Held*, in an action for damages, 1, that the conductor, having accepted and retained the fifty cents, could not afterward eject the plaintiff; 2, that evidence was inadmissible to show the car fare to J.; and, 3, that the company, in order to enforce said regulations, were bound to keep their ticket office open a reasonable time in advance of the departure of train, to enable passengers to procure their tickets.

THIS was an action to recover damages for the expulsion of plaintiff from defendants' cars at Lake Johanna crossing, between St. Paul and Minneapolis. By the regulation of the company persons entering the cars without first having procured tickets at the office were charged ten cents in addition to the regular fare. The plaintiff, intending to go to Minneapolis, went to defendants' office at St. Paul, just before the starting of the train, and finding it closed, entered the car without a ticket. When the conductor came to collect tickets, plaintiff informed him of his destination and tendered him

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fifty cents, the regular ticket fare, which was received and retained. The conductor afterward demanded the extra ten cents, and, on his refusal to pay it, ejected the plaintiff at Lake Johanna crossing, the next station. On the trial the jury found a verdict for plaintiff for \$500. The defendant moved for a new trial, which was denied, and this appeal brought.

H. R. Bigelow, for appellant.

Geo. L. Otis, for respondent.

McMILLAN, J. This action is brought by the plaintiff against the defendant to recover damages on account of the expulsion of the plaintiff, while a passenger, from the cars of the defendant.

All the questions, except one, arise upon the charge of the court, and all are presented by the parties and considered in connection with the charge. The court charged the jury as follows: "If the jury shall find from the evidence that the plaintiff made known to the conductor that he was going to Minneapolis, and in good faith tendered to him fifty cents as the full fare to that point, and it was in fact the full fare when paid in advance at the ticket office of the defendant, the conductor had no right to take the money except for the specific purpose tendered, to wit: as a full payment of such fare; and after taking and retaining the money so tendered, he had no right to eject the plaintiff from the car; and in such case the ejection was wrongful, and the plaintiff would be entitled to recover."

Also, that "It was the duty of the conductor, if he intended to insist upon the payment by the plaintiff of the regular train fare, to return the money which the plaintiff paid him; and that he had no right to put the plaintiff off the train without first returning such money, if it was tendered by the plaintiff as the fare from St. Paul to Minneapolis."

And the court refused to charge (as requested by the defendant): "That if the plaintiff persistently refused to pay the established fare from St. Paul to Minneapolis, that is to say, the sum of sixty cents, when paid on the cars; and if the conductor, for that reason, expelled him from the cars at Lake Johanna crossing, using no unnecessary force for that purpose, then the plaintiff cannot recover, but the verdict must be for the defendant." To each of the charges

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so given, and to such refusal, an exception was taken by the defendant. In the course of the trial the defendant's counsel asked the superintendent of the railroad, then a witness on the stand:

"What was the fare on the 8th of March last from St. Paul to Lake Johanna crossing?" Which question was objected to by plaintiff's counsel as immaterial. The counsel for the defendant here stated, in answer to a question by the court, that he did not expect to prove a contract between the plaintiff and the conductor to go only to such crossing, but did expect to prove that the regular fare in the cars from St. Paul to Johanna crossing was fifty cents. The court thereupon sustained the plaintiff's objection, and to such ruling the defendant by its counsel duly excepted.

The defendant is a common carrier of passengers, and subject to the duties and entitled to the privileges and powers incident to such employment. *Com. v. Power and others*, 7 Met. 601.

At the time of the occurrence involved in this case, it was the practice of the company to admit passengers into the cars without tickets or prepayment of fare, and to collect the fare after the starting of the train, the conductor passing through the cars and calling upon the passengers for their tickets or fare.

The plaintiff, therefore, wishing to travel on the defendant's road, had a right to enter the train and take a seat, and having taken a seat in the car with the intention, *in good faith*, of going from St. Paul to Minneapolis, he had a right to retain his place so long as he complied with the reasonable regulations of the company. In the absence of qualifying circumstances, the plaintiff, not having procured a ticket before entering the car, would be liable to pay the rate of car fare established by the company; otherwise his right to a seat or passage in the train would be determined, and, upon his refusal to pay such fare, the company would have a right to use such reasonable force as would be necessary to eject him from the train. But this is a right which the company might waive; and the plaintiff, having tendered the conductor the sum of fifty cents, believing it to be the full fare to Minneapolis, and that sum being the actual fare when a ticket is procured at the office, it was the duty of the conductor, if he did not intend to accept it as full fare for the plaintiff, to refuse the tender by declining to receive it, or by immediately returning it when advised of the purpose for which it was made; but having received and retained it with a knowledge of the purpose for which it was tendered by the plaintiff, it must be held to be an

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acceptance of the same as full payment of the plaintiff's fare to Minneapolis.

It is claimed by the defendant that "the plaintiff, by entering the defendant's cars as a passenger, assumed the duties of one, and became liable and must be held to pay his fare as upon an implied contract, and as one of these duties, for whatever distance he should remain a passenger, according to the regular rates of the company;" that the regular fare from St. Paul to Lake Johanna crossing, as the defendant offered to show, was fifty cents, and the plaintiff having traveled that distance before the expulsion, was indebted to the company that sum under the implied contract; the conductor, therefore, was justified in retaining the amount paid by the plaintiff.

In this case it distinctly appears that the plaintiff entered the cars for the purpose of going to Minneapolis, and not elsewhere, and that he had no intention whatever of leaving the cars at Lake Johanna crossing, and did not do so until forcibly expelled by the conductor from the train, and under many disadvantages returned to St. Paul. Whatever may be the law under a different state of facts, where, as in this instance, it appears positively that the plaintiff did not, in fact, intend to make such a contract as the defendant would imply, but did intend one of an entirely different character, and that the services performed in carrying the plaintiff to the crossing mentioned were not only of no benefit to the plaintiff, but a positive disadvantage and inconvenience to him, it would do violence, it seems to us, to every sound principle of reasoning to say that, from such fact, the law implies a contract upon the part of the plaintiff to pay his fare at the regularly established rates, or at any rate, for the distance traveled before his expulsion from the car.

We think the charges and rulings of the court were correct. The court further charged the jury, at the request of the plaintiff, that: "If the jury shall find from the evidence that fifty cents was the ordinary fare from St. Paul to Minneapolis, and the defendant by its regulation exacts the further sum of ten cents only in case of the omission to purchase a ticket in advance, then they are bound to keep their ticket office open a reasonable time in advance of the departure of trains to enable passengers to procure their tickets, and if on the occasion in question the ticket office was not open for such reasonable time as to enable the plaintiff to procure his ticket, they had no right to demand of him the extra ten cents, and the expulsion from the train was wrongful, and the plaintiff is entitled to

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recover." The court also charged as follows: "What is such reasonable time for the ticket office to be open in advance of the departure of the train is a question of fact for the jury under the instructions of the court."

And the court refused to charge, as requested by the defendant, "that if the fare from St. Paul to Minneapolis, as established by the defendant at the time of plaintiff's alleged grievance, was, when paid on the cars, sixty cents, and if the plaintiff was on the train without a ticket, and persistently refused to pay such fare when requested so to do by the conductor, the defendant was not bound to carry him to Minneapolis, but had the right to remove him from the cars, using no more force than was necessary for that purpose," except with the proviso, "that plaintiff had reasonable opportunity to get a ticket; but did so instruct them with such proviso."

The company had a right to make any reasonable regulation as to the payment of fare by passengers upon its road, and in the exercise of its power could make a discrimination between fares paid by passengers in the cars, and those paid at the ticket office by purchasing tickets, and it is immaterial whether the mode of this discrimination is by selling tickets at a stated discount from the regular fare, or, if tickets are not procured, by charging a sum beyond the regular fare. But we think both reason and authority sustain the rule, that, in order to justify the expulsion of a passenger from the train for refusing to pay the difference between the ticket fare and the regular car fare, when a ticket is not purchased, the company must afford passengers reasonable and proper opportunity to avail themselves of the advantage, and to avoid the disadvantage of this discrimination in fares which it publicly offers. *The Chicago B. & Q. R. Co. v. Parks*, 18 Ill. 464; *St. Louis A. & C. R. Co. v. Dalby*, 19 id. 364; *The Jeffersonville R. Co. v. Rogers*, 28 Ind. 3; 1 Redfield on Railways (3d ed.), 104. The only case referred to, or which has come to our attention holding a different doctrine, is that of *Crocker v. The New London, Willimantic and Palmer Railroad Company*, 24 Conn. 249. In that case it is held, among other things, that the regulation making a discrimination in fares was a mere proposal and could be withdrawn by the company at any time before being actually accepted by a passenger, and that the closing of the ticket office for the night before the plaintiff applied for a ticket was a withdrawal of the offer to discriminate in favor of those purchasing tickets. The report of the case shows that, upon

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On this point, the members of the court taking part in the decision were equally divided in opinion, two judges dissenting. The case has been considered in several instances by other tribunals, and has failed to command the approval either of courts or commentators. 19 Ill. 364; 28 Ind. 5; 1 Redfield on Railways, 105; see also *The State v. Chovin*, 7 Iowa, 204.

It may be conceded that the offer to discriminate is, in the first instance, a mere proposal, and yet as a common carrier the right of the defendant to change or withdraw the proposition may not be unlimited. However that may be, the mere fact of the ticket office being closed does not create the presumption in law or fact of a withdrawal of the offer (28 Ind. 5); and in the case at bar it is not pretended that there was in fact a withdrawal of the offer, for the evidence shows that the regulations existing at the time of this occurrence had existed for several years previous. If, therefore, the ticket office was not open for such reasonable time previous to the departure of the train as to enable the plaintiff to procure his ticket, the defendant could not demand of him more than the ticket fare, and his expulsion from the train was wrongful. What is a reasonable time for such purpose must depend on circumstances: what would be a reasonable time at a country station might not be sufficient in a large city; what would be reasonable in either depends on the number of passengers usually entering the train there, and other circumstances. What was a reasonable time in this instance, therefore, was properly submitted to the jury under the instructions of the court. *Cochran v. Toher et al.*, 14 Minn. 391. It was further claimed by the defendant that there was no evidence what was a reasonable time for the office to be kept open, or whether the office was in fact open for such reasonable time. The testimony of Mr. Delano, the superintendent of the road, shows that the general instruction of the company to agents on the road is to have ticket offices open from ten to fifteen minutes before starting of trains; that they have a special ticket agent at St. Paul, and intend to have the office there open that much or more.

The plaintiff testifies that he went to the baggage master and had his baggage checked; that afterward, and about fifteen minutes before the train started, he went to the ticket office and found it closed; he then went and took his seat in the train.

Mr. Perkins, another passenger, states, that he bought his ticket at the office about five minutes before the train started: that the

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office was then open. Whether there was other testimony or not does not appear; and while the testimony before us is rather slight, we think there was sufficient to justify the charge of the court.

There was no error in the instructions of the court, nor in its refusal to instruct as requested by the defendant; the exceptions under consideration, therefore, cannot be sustained.

The court, at the plaintiff's request, charged the jury that, "in estimating the damages which the plaintiff is entitled to recover, the jury may take into account not only the loss of time, but pain of body, pain of mind, and injury to the feelings of the plaintiff. They may award damages, in their discretion, as a compensation for the ill-treatment to which the plaintiff was subjected in ejecting him from the cars;" to which the defendant excepted. The defendant also requested the court to charge "that the plaintiff in any event can recover only the damages proved, and as he has failed to prove any special damages, but has shown himself at fault and in the wrong in the matter, the defendant has been guilty, at most, of only technical wrong, and the verdict should be for only nominal damages." The court refused so to charge, and the defendant excepted.

The rule of damages, as laid down by the court in charging the jury as requested by the plaintiff, embraces only such as are in themselves compensatory damages, and such as are alleged in the complaint, or implied by law, and in this case, we think, was entirely correct, and it follows, the refusal to instruct, as requested by the defendant, was not erroneous.

In cases of this kind the jury are the proper judges of the amount of damages to be allowed, and unless there is something in the case showing that the jury in their determination were influenced by passion, prejudice or some improper motive, the court will not interfere. *City of St. Paul v. Kuby*, 8 Minn. 171; *Chamberlain v. Porter*, 9 id. 269; *Chapman v. Dodd*, 10 id. 350. While the damages allowed in this case are large, we cannot say that they indicate any misunderstanding of the rule of compensation as given by the court, or that the jury were influenced by any improper feeling or motive.

The order appealed from is affirmed.

NOTE. Under chapter 228 of the laws of 1857 of the state of New York, which authorizes the New York Central Railroad Company to demand five cents extra fare from a passenger who fails to purchase a ticket, provided said company keep its offices open.

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between certain hours of the day, "at least one hour prior to the departure of each passenger train from such station," it was held, that, where a passenger applied at the office for a ticket but failed to get it in time to enable him to get safely on the cars, owing to the temporary absence of the agent, the company could not require the extra fare. *Porter v. New York Central Railroad Co.*, 34 Barb. 353. So where the passenger took the cars at a station where the ticket office was closed, it being later than the company were required by statute to keep their office opened, it was held, that, if the company demanded and received the extra fare, they would be liable to the penalty prescribed for charging beyond a certain rate of fare. *Chase v. New York Central Railroad Co.*, 20 N. Y. 523; *Nellis v. New York Central Railroad Co.*, 30 id. 505. — *REP.*

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appellants.

(15 Minn. 136.)

Right of way over a strip of land described in a deed as a street.

J., owning lands, on which was a strip called a street, but which was not laid out or dedicated as a public highway, conveyed the same to S., by a conveyance in which the said strip was mentioned as a boundary and described as "St. Charles street." Subsequently S. conveyed a portion of such lands to the plaintiff, "with all the privileges and appurtenances thereunto belonging," referring to the so-called street, in the deed. The land so sold did not abut or front upon such street, nor was there a right of way by necessity over the land intermediate. *Held*, that the plaintiff did not acquire any right of way over the so-called street.

Where it does not appear that a person will sustain any special or peculiar damage in consequence of the obstruction of a public highway, an injunction to restrain such obstruction will not be granted at his suit.

THE facts are set forth in the opinion.

Brisbin & Palmer and *H. J. Horn*, for appellants.

George L. Otis and *I. V. D. Heard*, for respondents.

BERRY, J. This is an appeal from an order overruling a demurrer to the complaint. The complaint alleges that the defendants have entered into possession of a certain strip of land situate in St. Paul, called St. Charles street; have excavated and are now engaged in excavating the soil thereof, and are erecting and threatening to continue to erect a stone building thereupon, which will occupy the northerly one hundred feet of said strip, and prevent travel thereon. The prayer of the complaint is, that the defendants may be adjudged

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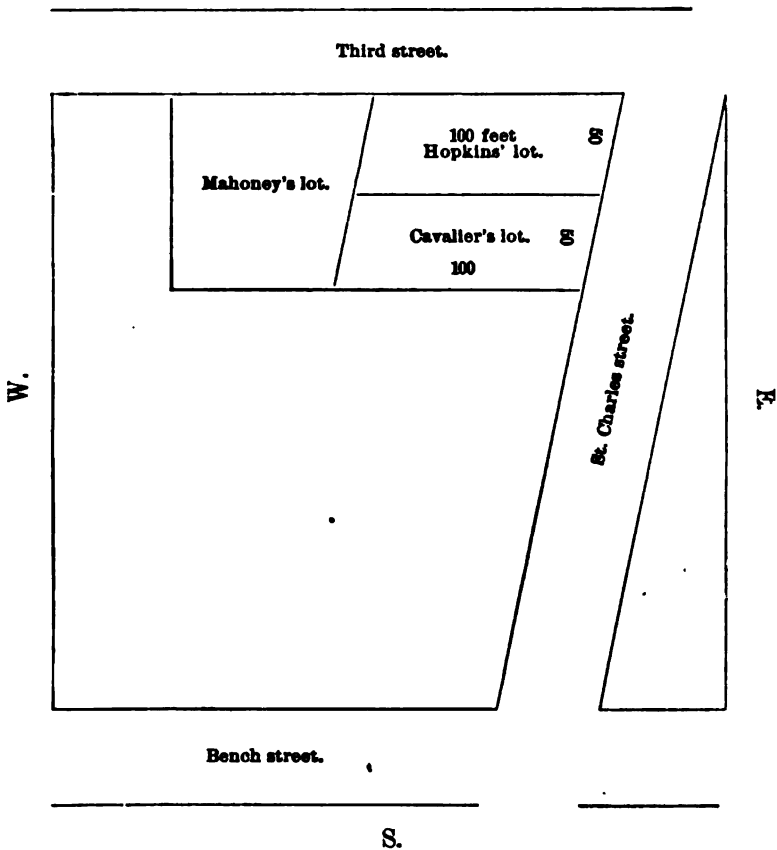
to restore said strip of land to the condition in which it was before they intermeddled therewith, and that they may be enjoined from proceeding with the excavation and with the erection of the proposed building. This relief is asked upon two grounds. First, because, as is alleged in the complaint, St. Charles street is a public street and highway, which the plaintiff, as a citizen of St. Paul, and a property holder therein, is entitled to use, pass over and have kept open as a street. No damage special and peculiar to the plaintiff is alleged to have accrued from the acts of the defendants, nor to be likely to accrue from the future prosecution or the completion of the work complained of. Neither does it appear that the plaintiff is the owner of, or in the occupation of, any premises fronting upon and adjacent to said so-called St. Charles street, from which fact, according to some of the cases, special and peculiar damages (though nominal in amount) might be inferred. *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio and Mississippi R. R. Co.*, id. 483; *Carlin v. Paul*, 11 Mo. 32; *Bingham v. Doane*, 9 Ohio, 165; *Schurmeier v. St. P. and P. R. R. Co.*, 10 Minn. 105. Upon this state of facts the plaintiff does not show himself entitled to the relief prayed for, so far as his prayer is based upon the theory that St. Charles street is a public street or highway. Where no peculiar and special damage is sustained by a private person in consequence of the obstruction of a public highway, which obstruction is a public nuisance, the remedy is only by indictment, or perhaps by suit in the name of the state, or of some one authorized to act for and vindicate the rights of the public. *Stetson v. Faxon*, 19 Pick. 154; *President and Fellows of Harvard College v. Stearns*, 15 Gray, 6; *Lawing v. Smith*, 8 Cow. 146; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 62; *Carpenter v. Mann*, 17 Wis. 155; Washburne on Easements, 569. Nor in such cases will an injunction be granted at the suit of a private person. *Id.* 577; *Brainard v. Conn. R. R. Co.*, 7 Cush. 506; *Hartshorn v. South Reading*, 3 Allen, 501.

The other ground upon which the relief prayed for in the complaint is asked is, that plaintiff is entitled to a private way over the so-called St. Charles street. The facts upon which this claim of a private way is based, as set up in the complaint, are as follows: On the 13th day of January, 1849, Louis Roberts, being the owner of certain lots of land, conveyed a portion thereof to Henry Jackson. The description and situation of the portion so conveyed will appear from the following diagram, which will be sufficiently accu-

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rate for the purposes of this opinion. All the land exhibited on the diagram, and lying between Third and Bench streets, including the strip marked "St. Charles street," was conveyed to Jackson, except the part marked "Hopkins' lot."

N.



On the 19th day of January, 1849, Jackson conveyed the part marked "Cavalier lot," to one Charles Cavalier, and in the deed to Cavalier the part so conveyed is described as follows, viz. "The following piece or parcel of land, etc., etc., known and designated as follows, viz.: fronting on St. Charles street fifty feet, and bounded

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on the north by the line of Daniel Hopkins, one hundred feet, south by the line of Henry Jackson, one hundred feet, and west by the land of said Henry Jackson, fifty feet, the said lot being fifty feet in front, and one hundred feet in depth." On the 22d day of January, 1849, and on the 21st day of January, 1850, Jackson conveyed to Franklin Steele all the land mapped on the foregoing diagram, and lying on the east and west sides of St. Charles street, except the two lots designated as the Hopkins lot and Cavalier lot. On the 16th day of August, 1851, Steele conveyed the tract marked on the diagram as the Mahoney lot to Jeremiah Mahoney, and, on the 13th of June, 1860, Mahoney conveyed the same to the plaintiff. The deeds from Jackson to Cavalier, from Jackson to Steele, from Steele to Mahoney, and from Mahoney to the plaintiff, all refer to and mention St. Charles street, either as a boundary, or as a starting point from which distances are reckoned; and the premises conveyed by each of said deeds are conveyed with all the privileges and appurtenances to the same belonging. The complaint also alleges that, through sundry mesne conveyances, the plaintiff has become and is the owner of a portion of the tract conveyed as aforesaid to Cavalier, and of a portion (other than the Mahoney lot) of the tract conveyed to Steele as aforesaid, with all the privileges and appurtenances to such portion belonging; but no particular description of either of such portions is given in the complaint, nor does it appear whether or not they front on or adjoin St. Charles street. The complaint further alleges that St. Charles street was, on the 18th day of January, 1849, and prior thereto, and ever since has been, and is, a strip of land thirty-five feet in width, and three hundred and thirty feet in length, extending from Third street to Bench street, then and ever since, and now, two public streets in the city of St. Paul, in said county, and that said Henry Jackson was the owner of the fee in said strip from the time of the said conveyance to him by Louis Roberts, until the year 1856, and that said strip of land was, at the time of said conveyance and prior and subsequent thereto, and at the time of the conveyance to Cavalier, hereafter referred to, used and styled by the public and said Jackson, as a street, and that said Jackson prior to said purchase by said Steele, and at said purchase, exhibited to said Steele a plat of said block 31, which said plat exhibited and showed said strip of land to be a street, and that said Steele in making said purchase relied upon the representation on said map that said strip of land

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was a street; and that this plaintiff when he purchased the said parcel of land from said Mahoney, and the other parcels of land of which he claims to be the owner as aforesaid, "believed that said strip of land was a public street, and relied on such belief in paying to said Mahoney and the parties from whom plaintiff purchased" the other parcels "the purchase-money therefor." The plaintiff's claim of a private way is stated in these words, viz.: "The complaint further shows that under and by virtue of said conveyances the plaintiff became seized and entitled to a right of way over said St. Charles street, as an appurtenance and privilege belonging to said grants and that he is now so entitled, and that by said conveyances said strip of land was a street as to this plaintiff."

From the plaintiff's brief we gather that the claim to a private way over St. Charles street is placed upon two grounds: *First*, that the references in the deeds from Jackson to Cavalier, and to Steele, to St. Charles street as a boundary, gave to Cavalier and Steele and their assigns a right of way over the same by implication or estoppel, and that the plaintiff, who derives title from Cavalier and Steele to a portion of the land conveyed to them by Jackson, takes such right of way as appurtenant thereto.

So far as this position is concerned, the claim to the right of way rests upon the fact that the land conveyed to Cavalier and Steele, of which the plaintiff's premises are parcel, abuts or fronts upon St. Charles street. And the general doctrine is, that under such a state of facts, and in the absence of qualifying circumstances, a grantor, if he be the owner of the so-called street, is estopped, as against his grantee, to deny that it is a street, and a right of way over the same passes to his grantee by implication of law. *O'Linda v. Lothrop*, 21 Pick. 292. But this implication of law rests upon the fact that the grantor has bounded, abutted or fronted the premises conveyed upon the street. It is also true, as a general proposition, that if the premises to which the right of way attached are divided, the right of way passes to each portion into whosoever hands it may come, but only so far as applicable to such portion. *Hills v. Miller*, 3 Paige, 256, 257; see also Washburne on Easements, 182. This rule is stated more broadly in *Watson v. Bioren*, 1 Serg. & Rawle, 227, and in *Underwood v. Carney*, 1 Cush. 285, cases cited by plaintiff; but in both the right of way was claimed in connection with premises abutting upon the way. Such was also the fact in *Huttemeier v. Albro*, 2 Bosw. 546, and 18 N. Y. 48; and in *Whitney*

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v. Lee, 1 Allen, 198. Now what are the facts in the case at bar? It does not appear that any portion of the plaintiff's premises abuts upon St. Charles street, and certainly it is for the plaintiff to aver that fact if his right depends upon it. It further appears that a portion of his premises fronts upon a public street called Third street, and it does not appear that every portion of his premises is not accessible from Third street. It follows, that there is nothing to show that he has any way of necessity over those portions of the land of Cavalier and Steele not conveyed to him, for a way of necessity is a way of strict necessity. Washburne on Easements, 164, *McDonald v. Lindall*, 3 Rawle, 492; *Gayetty v. Bethune*, 14 Mass. 49; *Leonard v. Leonard*, 2 Allen, 543; *Nichols v. Luce*, 24 Pick. 102. How, then, can it be said that the right of way over St. Charles street, which passed to Cavalier and Steele, is in any degree applicable to the premises of the plaintiff? The right of Cavalier and Steele arose from the fact that the lands conveyed to them fronted upon St. Charles street. And their right was a right to pass and repass over the way to and from and over and upon the front of their lands. And if, either by express grant from Cavalier and Steele, or by such a grant as the law implies from the necessity of the case, the plaintiff had acquired the right to pass and repass over the land of Cavalier and Steele, not conveyed to him, in order to reach St. Charles street in going to and from his premises, then he might contend with great force of argument that he was entitled to a right of way over St. Charles street. But upon the facts stated in the complaint it does not appear that there was any such grant, either express or implied, so that the plaintiff's premises are cut off from St. Charles street by an intervening tract of land which excludes him from any beneficial participation in the right of way. In other words, the right of way is not applicable to the plaintiff's portion of the land conveyed to Cavalier and Steele. The case seems to us to stand upon the same footing as if Jackson had conveyed the plaintiff's premises to him without any express grant, or grant implied from necessity, of a right of way over St. Charles street, and had subsequently conveyed to Cavalier and Steele all that he did convey to them, plaintiff's premises excepted. It would hardly be contended in the case supposed that the plaintiff would acquire any private right of way in St. Charles street. Upon the whole, then, we are of opinion that the plaintiff, so far as the complaint discloses the situation of his premises, did not acquire

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any right of way over St. Charles street, under the references to the same in the deeds to Cavalier and Steele, and the other conveyances before spoken of.

The other ground upon which the plaintiff claims the right of private way is taken upon the facts stated in the following extract from the complaint, viz.: "That said Jackson prior to said purchase by said Steele and at said purchase exhibited to said Steele a plat of said block 31, which said plat exhibited and showed said strip of land to be a street, and that said Steele in making said purchase relied upon the representations on said map that said strip of land was a street," etc. Block 31 appears to have embraced all the land represented on the foregoing diagram west of St. Charles street. We do not perceive that this ground of claim is to be distinguished in principle, or in any essential substantial respect, from the first.

If the exhibition of the map and Steele's reliance upon it are of importance, it is because such exhibition was a material representation, the truth of which good faith estops Jackson and those claiming under him, to deny. If St. Charles street was in fact a public street, then, as we have already seen, it is not for the plaintiff, upon the facts appearing in this case, to complain of its obstruction. The plaintiff's contention is, however, that the effect of the exhibition of the map was to confer upon Steele and those claiming under him a private right of way over St. Charles street. Whether this result would follow from the simple exhibition of a plat or map to which no reference was made in the deed of conveyance is by no means altogether clear. See *Squire v. Campbell*, 1 Mylne & Craig, 459, 478. But admitting that such would be the effect of a simple exhibition of the plat, it seems to us that the representation to be implied would be substantially the same as that inferred from the call of a deed bounding the premises conveyed upon a street. That is to say, it would be a representation that the premises conveyed abutted or fronted upon a strip of land over which the grantee and those claiming under him would have a right of way; a right arising from the frontage, and in all respects resembling the right which we have before endeavored to define in considering the effect of the language of the deeds to Cavalier and Steele.

The case of *Wyman v. Mayor of New York*, 11 Wend. 487, cited by plaintiff and referred to in *Wilder v. St. Paul*, 12 Minn. 203, is to be distinguished from the case at bar, because it was a case in which *lots* were conveyed according to a map, either by the express

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terms of the conveyance or by an implication of law in reference to streets in the city of New York.

It is also to be observed that a somewhat peculiar legal character is impressed by statute upon streets in a large portion of that city. *Matter of 17th street*, 1 Wend. 270; *Matter of Lewis street*, 2 id. 475.

For these reasons we are of opinion that the complaint does not state facts entitling the plaintiff to the relief sought, and the order overruling the demurrer is accordingly reversed.

Reversed.

STATE *ex rel.* ATHERTON V. SHERWOOD.

(15 Minn. 221.)

Election — Certificate of, prima facie evidence — Mandamus.

The relator received from the proper officer a certificate of his election to the office of district clerk of M. county; he subsequently took the oath, gave and filed the bond required by law, and then demanded of the respondent—the former clerk, whose term of office had expired, and who was in possession—the seal, records, books, papers, etc., belonging to said office. The respondent answered that the relator, being a non-resident of the state, was ineligible to the office, and therefore not legally elected. *Held*, that the relator was entitled to a mandamus.

A certificate of election is *prima facie* evidence of title, and the court will not go behind it in proceedings for a mandamus.

THE following decision was rendered on the return of an alternative writ of mandamus. The facts are stated in the opinion:

Allis, Gilfillan & Williams, for relator.

George E. Cole, for respondent.

RIPLEY, C. J. The alternative writ in this case recites, that at the last general election the relator, a citizen of the United States, of full age and residing in Austin, in Mower county, was elected to the office of clerk of the district court of said county, and upon the official canvass of votes received a certificate of such election

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under the hand and official seal of the county auditor, and thereafter, on the 30th day of December, 1869, took the oath and gave the bond required by law, and, on the 4th day of January, 1870, filed the same in the office of the register of deeds; that on the 5th day of said month, at the office of the clerk of said court, he demanded of the respondent, who was his predecessor, and whose term of office had expired, the seal, records, books, papers, and all other things whatsoever belonging to said office, and then in respondent's possession, who refused to deliver the same to him.

The writ requires the respondent to deliver them, or show cause to the contrary.

On the return of the writ, the respondent moved to quash it, because it does not allege that there was any clerk to be chosen at such election, or that relator received a majority of the votes cast, or that he was eligible, as having resided in the state and county for the time required, previous to said election; in other words, that it does not show a title in the relator to the relief demanded.

The statute requires the writ to state concisely the facts, showing the obligation of the defendant to perform the act. Rev. Stat., chap. 80, title 1, sec. 4. This is but the converse of the rule at common law, that the writ must show a clear right to the relief demanded. The relief demanded is the delivery of the seal, records, etc., appertaining to the office of clerk. Do the facts alleged in this writ sufficiently show a clear right in the relator to such relief? Although loosely drawn, it sufficiently appears from it that the relator holds a certificate from the proper officer, of his election, at the last general election, to the office of clerk of the district court; that he has duly qualified; that the respondent, who was his predecessor in said office, and whose term of office has expired, is in possession of the articles demanded, and refuses, though requested, to deliver them to the relator.

These allegations bring the case within the scope of the decision in *Crowell v. Lambert*, 10 Minn. 369, for they show the relator to hold a certificate of election to the office, to have duly qualified himself for the exercise of the duties, and that the respondent has no right whatever to the possession of the articles demanded.

It is true that the writ does not state for what term the election was had, but the presumption is that it was legally held, and also, as the term of office is fixed by the constitution at four years, and not until a successor is elected and qualified, and as the respondent

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is alleged to have been the predecessor of the relator in such office, and that such preceding term had expired, that it was for the regular term commencing January 1, 1870. Const. art. 6, sec. 13; Rev. Stat. chap. 1, sec. 1. The motion to quash must therefore be denied.

The answer alleges that, on the second day of December, 1869, there was a vacancy in the office of clerk; that on that day the respondent was duly appointed by the judge of said court to fill such vacancy, and hold and exercise the duties of such office till his successor should be elected and qualified; that he has duly qualified under such appointment, and still holds and exercises the duties of said office thereunder, and that no successor has been elected or qualified; that relator was at the time of said election and still is a citizen of Michigan, and had not resided in this state and said county for the required time previous to said election, and therefore was not eligible to, nor entitled to hold, said office.

The possession by respondent of the articles demanded, and the demand and refusal, are admitted. The expiration of respondent's term of office is denied, and, as to every other allegation in the writ, any knowledge or information sufficient to form a belief.

The answer further alleges that witnesses material to maintain the issues therein tendered reside in Michigan; that no adequate means are provided by law whereby said issue can be tried in this court, and that he is entitled to a trial thereof by jury, which cannot be had in this court.

Upon filing this answer, the relator moved to strike out all the allegations of new matter therein as irrelevant, and the denial on information and belief as sham.

The respondent also moved to dismiss the proceedings, upon the ground that the issues tendered by the answer were material; that he was entitled to a trial by jury therein, which could not be had in this court, nor any process or means by which he could obtain testimony from without the state.

The issue tendered is whether or not the relator was *eligible*.

From what has been already said, it follows that this issue would be immaterial but for the alleged appointment of respondent, as it would still leave the relator holding the certificate of election, and duly qualified, and the respondent in possession without right. Does the fact that he has been appointed to hold till a successor is elected and qualified make it a material issue? The respondent claims that *Crowell v. Lambert* was decided upon the peculiar cir-

circumstances of the case showing a vacancy in the office *de jure*, until Lambert's successor was inducted, and is not to be extended beyond them. The decision in that case is that the person holding the certificate is, under those circumstances, *prima facie*, the officer, and therefore *prima facie* entitled to the insignia and records of the office.

If, in this proceeding, we are to go behind the certificate of election and try the *title* of the relator to the office, that case does not govern this, and the eligibility of Atherton is a material issue, otherwise not.

The correct rule seems to be that *mandamus* does not lie to try and finally determine the title to an office, except perhaps in a case in which the law has provided no other means of doing so. *People v. Stevens*, 5 Hill, 616, 628; *People v. Head*, 25 Ill. 325; *King v. Mayor of Colchester*, 27 R. 259; Angell & Ames on Corp., § 738, and cases cited in note.

Our statutes have not changed the rule in this respect. They contain nothing from which an intention to enlarge or change the issue to be tried can be inferred, and though the writ of *quo warranto*, which is the adequate and specific remedy to try title, should be held to have been abolished, other and very adequate provisions are made for the full and speedy trial and determination of questions as to *title* to office. Rev. Stat., chap. 79, § 3.

It would seem, then, to be immaterial in this proceeding whether or not the relator was eligible, or was duly elected to the office, for to try either issue would be to try the title. Cole on Crim. Inf. and Quo Warranto; 31 Law Library, chap. 3, pp. 105, 107.

What then remains on these pleadings which is material to be tried? As we are not to go behind the certificate of election, we are only to determine whether or not the relator has received the certificate of election, and has given the bond, and taken the oath required by law. If so, he is, *prima facie*, the "successor, elected and qualified," of the respondent, and, as such, entitled to the possession of the articles demanded, until, in a proper proceeding for that purpose, his title to the office shall have been tried and found defective.

In other words, a *prima facie* title to an office gives a right to the possession of the insignia and furniture thereof, and the records and other books and papers appertaining thereto.

But, it is said, that as *mandamus* will not lie to admit one to an

office which is full, of one holding under color of right, but the claimant must resort to his proceeding in the nature of *quo warranto*, and, as this office is thus full, this writ must be dismissed.

But the reason of the rule is, that a *mandamus* to admit runs to others than the incumbent, and they are required to oust him, and thus his rights are sought to be passed upon in a proceeding to which he is not a party. But this is not the case. The respondent's title to hold till his successor is elected and qualified is not in question.

If the view we have taken is correct, the relator, if he has a certificate and has qualified, is, *prima facie*, the clerk. He presents himself with all the evidence which the law has provided that he is the respondent's successor in office, elected and qualified. It is not for the latter to demand any other, or further evidence, before delivery of the insignia of the office, and the necessary means and implements for the exercise of its duties. If he may, why may he not also prescribe its character, and decide on its sufficiency? While we have found no case in which the title to an office has been tried on a *mandamus* brought for similar, or analogous relief, the precise question raised here was raised and decided in the case of *The People v. Head*, 25 Ill. 325, cited in *Crowell v. Lambert*, but even more entirely coincident in the question involved with this. The petition in that case recited that the relator held a certificate of his election as clerk of the county court of McDonough county; that he had subsequently received his commission from the governor, and had qualified; that the former clerk, whose term of office had expired, was in possession of the records, furniture, and key of the office, and refused to deliver them, and prayed a *mandamus* to compel their delivery to the relator.

The answer alleged, that respondent held his office by law till his successor was elected and qualified; that he was a candidate for re-election, and received a majority of the legal votes, and was actually contesting the election in the circuit court, and that in the mean time he was entitled to possession, and prayed that the court would dismiss the writ, or make up an issue whether relator or he were duly elected, and send it to be tried in the circuit court. The court say that upon the receiving the certificate of election, and taking the oath of office, and giving bond, the relator was as much entitled to take possession of the office as he ever could be.

Who, they ask, shall say, without law, that the party who pos-

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sessed all the evidence of election and qualification which he ever can have, all that the law has authorized to be given in any case, is not entitled to, and shall not enjoy, the office?

This covers the whole ground, for if the respondent in that case had confessed the right of the relator to the records on the ground that he was not *eligible* to the office, the above remarks would have been just as applicable. The case cannot be distinguished in principle from the one at bar, and the decision there reached seems to be well founded, both in reason and authority.

To our minds, the heavy fine provided in our statute in the case of usurpation, or unlawful holding of office, confirms the view we have taken.

It is as if the legislature, in view of the right of the holder of a *prima facie* title to possession, meant by this penalty to deter those who were not *bona fide* the duly qualified choice of the people from abusing that right. The foregoing considerations dispose of the respondent's motion to dismiss, in all respects except that based on his supposed right to a trial by jury, and relator's motion to strike out the new matter, as irrelevant, must be granted.

The motion to strike out the denial on information and belief, as ham, as already intimated, must be denied. It puts in issue the material facts of the issuance of the certificate, and the oath and bond of the relator.

As to the oath and bond, the respondent admits that they are presumably within his knowledge, and offers to modify his answer so as to admit their execution and filing, but the issuance of the certificate is in no sense presumably within respondent's knowledge.

The case of *Mower v. Stickney*, 5 Minn. 397, is to the point on this question, and decisive.

This issue is to be tried in the manner provided by Stat. 1869, ch. 79, for we are clearly of opinion, that the provisions of the Constitution, art. 1, sec. 4, relating to trial by jury, were not intended to and do not include proceedings of this nature.

It remains to be considered whether or not the relator has, in the words of the statute, another "plain, speedy and adequate remedy." It is urged that he has; that the proceedings referred to in the nature of a *quo warranto* lie for him against respondent. If it be so, still this remedy is not "speedy and adequate," for it does not give him that immediate and present *possession* to which he is entitled. The result of the whole matter is, that a referee will be

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appointed to try the issue as to the certificate of election, and file his report with all convenient speed, and, if upon his report the fact appears to be as alleged in the writ, a peremptory mandamus will issue on the confirmation of the report, otherwise the writ will be dismissed.

CHRISTENSON *et al.* v. THE AMERICAN EXPRESS CO.

(15 Minn 270.)

Carriers — Express companies — Liability of.

The defendants were an express company, engaged in transmitting from place to place goods for hire, having at different points local agents whose duty it was to receive goods transmitted and deliver the same to the consignee as well as to receive goods for transmission, having no vehicles or other means of transportation except at their local offices for local purposes, but transmitting goods, in charge of their messengers, by steamboats, railroads, coaches, etc., owned and controlled by other parties. Plaintiffs' agent delivered to them goods for transportation, taking a receipt, in which it was stipulated that the defendants were not to be held liable for any loss or damage except as forwarders only, nor for perils of navigation and transportation. The steamboat on which the goods were being transported, in consequence of the negligence of those in charge, ran upon a snag and was sunk, thereby injuring the goods. In an action to recover the damage, *held*, that the defendants were common carriers, not forwarders, and, as such, liable for the loss, notwithstanding the terms of the receipt, which could not cover losses arising from negligence.

THIS was an action brought by the plaintiffs against the defendants, the American Express Company, as common carriers of goods, and it was charged that the said defendants, as such carriers, on the 29th of April, 1867, in consideration of a reasonable compensation to be paid therefor, undertook and agreed with the plaintiffs to safely carry two chests of tea, belonging to said plaintiffs, from the city of New York to Mankato, in the state of Minnesota, and deliver the same to them at said last-named place; that said defendants did not deliver the said tea, and that the same, by means of the negligence of the defendants, was lost, to the damage of the plaintiffs of two hundred dollars, for which sum they asked judgment. The defendants denied that they were common carriers, or that the goods were lost through the negligence alleged; that they were only for-

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warders; that, when the goods in controversy were received by them, it was expressly stipulated that they should only be held liable as forwarders, and also that they were not to be liable for the perils of navigation or transportation. While the goods were *en route*, in charge of one of defendants' messengers, the steamboat on which they were being transported struck a sunken snag and they were lost. The defendants neither owned nor controlled the boat. The referee found that the accident had happened through the negligence of those in charge of the boat, and gave judgment for the plaintiffs.

The other facts appear in the opinion.

W. P. Warner, for appellant.

Woolfolk & Brown, for respondent.

BERRY, J. The defendants are an express company engaged generally, and publicly, in the business of transmitting, for hire, goods from place to place, and, among others, from New York to Mankato. At different points to which their business extends they establish local offices, at which an agent is stationed, whose duty it is to receive goods transmitted, and deliver the same to the consignee, as well as to receive goods for transmission. The defendants own no vehicles or other means of transportation, except such as are kept at their local offices, and used solely for the purpose of carrying goods to and from such offices, to and from their customers, at the places where the offices are established. The practice of the company is to transmit goods by steamboats, railroads, coaches, etc., owned and controlled by other parties; and it receives to its own use the entire charges for transportation. A messenger in the company's employ accompanies the goods as they are being transmitted, to take general charge of the same, attend to their transshipment, and to their delivery to the local agent at the point of destination. A common carrier is defined to be "one who undertakes, for hire, to transport the goods of such as choose to employ him, from place to place." *Dwight v. Brewster*, 1 Pick. 50, 53; 2 Parsons on Contracts, 163; 1 Smith L. Cases, 301.

In *Buckland v. Adams' Express Co.*, 97 Mass. 124, it is held, that one whose business is for hire to take goods from the custody of their owner, assume entire possession and control of them, transport them from place to place, and deliver them at a point of destination to consignees or agents, there authorized to receive them, is a com

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mon carrier, although he styles himself an express forwarder, and although he contracts with others to transport the goods in vehicles of which they are the owners, and the movements of which he himself does not manage or control. These definitions are in our opinion correct, and the defendants, falling within them, must be regarded as common carriers. See, also, *Street v. Barney*, 23 N. Y. 335; *Russell v. Livingston*, 19 Barb. 346; 2 Redf. on Railways, 19, 30.

This action is brought to recover \$150, for two chests of tea belonging to the plaintiffs, the receipt of which by the defendants for transmission from New York to Mankato, and the total loss of which, by the sinking of a steamboat, not owned or controlled by the defendants, but upon which the same were being transmitted, are admitted. It is also admitted that the boat sank in consequence of running upon a snag in the Minnesota river, but whether this was, or was not, owing to negligence on the part of those managing the boat is matter of dispute, as to which the testimony is conflicting. Suffice it to say, however, that there is evidence in the case reasonably tending to sustain the finding of the referee, that the persons operating the boat were guilty of negligence in running upon the snag, so that there is no occasion to disturb the finding, on the ground that it is unsupported by the evidence in this respect. It is found by the referee that Bass and Clark, respondents' consignors, delivered the tea to the defendants at New York, consigned to plaintiffs at Mankato, and at the time of such delivery took from defendants the following receipt:

American Express Company, express forwarders and foreign and domestic agents. Principal office Nos. 57, 59 and 61 Hudson street. Branch offices, 124 Broadway and 542 Broadway.

NEW YORK, April 29, 1867.

Bass and Clark delivered to us two chests tea marked Christenson & Bro., Mankato, Minn., which we are to forward to our agency nearest or most convenient to destination, only perils of navigation and transportation excepted, and it is hereby expressly agreed, and is part of the consideration of this contract, that the American Express Company are not to be held liable for any loss or damage, except as forwarders only, nor for any loss or damage of any box, package or thing, for over \$150, unless the just and true value thereof is herein stated, nor for any loss or damage by fire, the acts of God, or of the enemies of the government, the restraint of government, mobs, riots, insurrections, pirates or from any of the dangers incident to a time of war, nor upon any property of thing, unless properly packed and secured for transportation, nor upon any fragile article consisting of or contained in glass.

For the company,

SPENCE.

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At common law a common carrier is an insurer of the goods entrusted to him, and he is responsible for all losses of the same, save such as are occasioned by the act of God or the public enemy. Angell on Carriers, §§ 67, 148, 153; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 381.

After much controversy, it may now be taken as settled by the great preponderance of authority, that it is competent for a common carrier to modify or limit his common-law liability by special agreement with the owner of the goods. *York Co. v. Central R. R.*, 3 Wall 112; *Judson v. W. R. R. Co.*, 6 Allen, 489; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 491; 2 Redfield on Railways, 93; 2 Parsons on Contracts, 233-237, notes and cases cited.

While there is some conflict of opinion among courts and text writers as to the extent to which the carrier may be permitted to modify or limit his common-law liability as an insurer, we think the better and wiser opinion is, that he shall not be permitted to exonerate himself from liability for his own negligence, or the negligence of the agents whom he employs to perform the transportation. The undertaking is to carry the goods; and to relieve the carrier from liability for loss or damage arising from negligence in performing his contract is to ignore the contract itself. It is to say that he shall not be liable for neglecting to do that which he agreed to do, for which alone the goods were delivered to him, and for which alone he has received, or is to receive, compensation. This construction would not only be repugnant to the contract, but it would be contrary to the whole spirit and policy of our laws, which make a person who undertakes to do a particular thing answerable in damages if, through his own fault or negligence, he fails to do it, or does it improperly. *York Co. v. Central R. R.*, 3 Wall. 112; *Laing v. Colder*, 8 Barr, 479; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 382; 2 Redfield on Railways, 98-108; *Wyld v. Pickford*, 8 Mees. & Wels. 443; 2 Parsons on Contracts, 247, note; *Sayer v. Portsmouth R. R. Co.*, 31 Me. 228; *Farnham v. R. R. Co.*, 55 Penn. St. 53; Angell on Carriers, §§ 265, 267. And he is responsible, notwithstanding the special agreement, for ordinary neglect; that is to say, for the want of ordinary diligence. *Wyld v. Pickford*, *supra*; Angell on Carriers, §§ 54, 268; 2 Parsons on Contracts (5th ed.). 243, note.

The special agreement may be in the form of a special acceptance of the goods by the carrier, as by a unilateral bill of lading, or

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receipt. *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 491; *Bowman v. Am. Express Co.*, 21 Wis. 152; 2 Redfield on Railways, 28; *Prentice v. Decker*, 49 Barb. 30; *Farnham v. R. R. Co.*, 55 Penn. St. 53; Angell on Carriers, §§ 54, 220.

But to bind the shipper by the terms of the special acceptance, he must expressly assent to it, or it must be brought home to him under circumstances from which his assent is to be implied. *Judson v. W. R. R. Co.*, 6 Allen, 489; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How., *supra*; 2 Redfield on Railways, 22, 93.

In this case it appears that, simultaneously with the delivery of the goods to the defendants, the receipt above recited was delivered to the plaintiffs' consignors, and it was produced in evidence by the plaintiffs upon the trial. In the absence of evidence to the contrary, it is to be presumed that the consignors were the plaintiffs' agents to contract for the transportation of the goods; and the delivery of the receipt to the consignors must be held to be equivalent to a delivery to the plaintiffs, to whose possession it appears to have come. And as there is nothing tending to show that any objection was made to the terms of the receipt, or that they escaped attention, the assent of the consignors—the plaintiffs' agents, and of the plaintiffs through their agents—to such terms is also to be presumed. *Gould v. Hill*, 2 Hill, 623; 2 Parsons on Contracts, 234; 2 Redfield on Railways, 22, 28; *Bowman v. Am. Express Co.*, 21 Wis. 158; *King v. Woodbridge*, 34 Vt. 571; *Shaw v. R. R. Co.*, 13 Ad. & El. (N. S.) 347; *Palmer v. Grand Junction R. W. Co.*, 4 M. & W. 749; *Dorr v. N. J. Steam Nav. Co.*, 1 Kern. 491. We are not, however, to be understood as determining that the circumstances under which receipts of this character are delivered may not sometimes be such as to repel any presumption of assent to their terms arising from the simple fact of taking such receipts. And this brings us to the most difficult question in the case, viz.: what is the fair construction of the receipt?

The defendants style themselves "express forwarders," and they agree to "forward" the goods. But this language does not necessarily give them the character of simple forwarders, nor prevent them from being treated as common carriers. *Buckland v. Adams Express Co.*, *supra*; *Read v. Spaulding*, 5 Bosw. 404.

Then they agree to forward "only perils of navigation and transportation excepted;" but while this exception embraces more than the "act of God," it goes no further than to exempt the carrier

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from liability for such perils as could not be foreseen or avoided in the exercise of care and prudence. The exception does not excuse the carrier for negligently running into perils of the kind mentioned. The proper construction is analogous to that which is put upon the words "perils of the sea," or "dangers of the lake," in bills of lading. *Fairchild v. Stocum*, 19 Wend. 332; S. C., 7 Hill 292; *Whitesides v. Tharltell*, 12 Smedes & Marsh. 599; *Hayes v. Kennedy*, 41 Penn. St. 378; Edwards on Bailments, 492-496, and cases cited; Angell on Carriers, §§ 166-174. While, then, it would seem very proper to hold that a snag in one of our western rivers is a peril of navigation, as appears to have been done in Tennessee (see cases cited in Edwards on Bailments, 492), if a vessel is wrecked upon one through the negligence of the carrier, or of those whom he employs, as the referee finds in the case at bar, the carrier is not absolved. Under such circumstances the loss is properly attributed to the agency of man, not to the peril of navigation. Having undertaken to carry the goods, the carrier shall not be heard to set up his own negligence to excuse him from responsibility.

The receipt goes on to say: "And it is hereby expressly agreed, and is part of the consideration of this contract, that the American Express Company are not to be held liable for any loss or damage, except as forwarders only." By this clause it is contended that the responsibility of the defendants is limited to that of forwarders, pure and simple; that *pro hac vice* they are forwarders to all intents and purposes. Now a mere forwarder is absolved from liability upon showing that he used ordinary diligence in sending on the goods, by careful, suitable and responsible carriers. Edwards on Bailments, 293; *Roberts v. Turner*, 12 Johns. 233; *Brown v. Dennison*, 2 Wend. 594; *Johnson v. N. Y. Central R. R. Co.*, 33 N. Y. 611. And the defendants insist that the boat, by the sinking of which the loss in this case was occasioned, being staunch and strong, properly manned and equipped, and run by a responsible company, they, the defendants, have done all that was required of them, and are therefore not liable. But looking at the whole scope of the receipt and at the mode in which the defendants transact their business, we think the construction contended for by the defendants cannot be allowed. The defendants do not agree to simply forward the goods as mere forwarders do, by delivering them to a carrier. In such cases, if the forwarder has exercised due diligence in selecting

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the carrier (when no particular carrier is designated by the owner of the goods), his duty is discharged, his connection with and responsibility for the goods cease; he has no interest in the freight, nor any thing to do with their ultimate delivery to the consignee at the point of destination. But in this case the defendants not only agree to forward the goods, but to forward them to their own agent. As the defendants state in their answer, such agent is, according to their usual course of business, to deliver the goods to the owner personally, and he receives the entire charges.

A messenger in the employ of the defendants accompanies the goods as they are being transported, to take general charge of the same and attend to their transshipment and delivery to the proper local agent. The defendants are not simply agents for the shipper to contract for the transportation of the goods. There is no contract between the owner of the goods and the owners of the vehicles or vessels which the defendants employ in conducting their business. The goods are delivered in the first instance to the defendants; the defendants, through their messenger, have charge of them during their transmission; the defendants employ the vehicles and vessels used in transportation for themselves, not for the shipper; the goods, when they reach the point of destination, are passed over by the messenger to the defendants' local agent, and by him delivered to the consignee. As remarked in a former part of this opinion, the defendants must, under this state of facts, be regarded as common carriers. Their contract is to *carry* the goods, and having entered into this contract they are not to be permitted to say that they shall not be responsible for the negligence of themselves or of the agencies employed by them in its performance, though they may, by special agreement, modify and limit their common-law liability as insurers of the goods.

From the very nature of their business, and of the service which they undertake to render to the plaintiffs, the defendants are not forwarders, but carriers, and when they assume to restrict their liability to that of forwarders, it is as much as to say that they will not be responsible to the owners of the goods according to their true character and to the actual relation which they sustain to them. In our opinion, then, the effect claimed, for this clause of the receipt by the defendants is inconsistent with, and repugnant to, the scope and intent of the receipt, viewed as a whole, and in connection with the facts showing the defendants' real character and mode of doing

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business. And although the defendants' liability at common law, as common carriers and insurers of the goods, is modified by other provisions of the receipt, as well as possibly in some respects by the clause under consideration, it is not so far modified by either as to exempt the defendants from responsibility for their own negligence, or the negligence of the agents employed by them in the transmission of the goods. In fact, so far as the simple duty of carrying is concerned, this clause would seem to have no bearing or application. In *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11, where an express receipt contained a stipulation that the express company were "not to be responsible except as forwarders," it was held to mean that the "liability" shall be governed by the principles of law applicable to forwarders; that is, that they shall only be liable for losses arising from a want of ordinary care on the part of themselves and in the agencies made use of by them in the exercise of their ordinary business of carriers. But though the view thus taken by the supreme court of California would, in the case at bar, lead to the same conclusion to which we arrive, the construction strikes us to be somewhat forced. We think the view which we take is the more rational, and it is substantially the same suggested by Mr. Redfield in his note to the case cited. 2 Redfield on Railways (4th ed.), 25.

In the case at bar, then, the receipt, and, for the purposes of this action, the value of the goods, and the loss by the sinking of the boat being undisputed, and the fact being found by the referee that the loss was occasioned by the negligence of those who were running the boat, judgment was properly rendered against the defendants. We have not adverted to the finding that the express messenger was also guilty of negligence, because that finding is not necessary to support the judgment, as well as because we have great doubts whether it is supported by the evidence in the case.

Judgment affirmed.

NOTE.—That express carriers who forward goods from place to place for hire, but in conveyances owned and managed by others, was decided in the following additional cases: *Lowell Wire Fence Company v. Sargent*, 8 Allen, 189; *Sherman v. Welles*, 28 Barb. 408; *Baldwin v. The American Express Company*, 23 Ill. 198; S. C. on Appeal, 26 id. 504; *Read v. Spaulding*, 5 Bosw. 359; *Harlem v. Adams Express Company*, 6 id. 235; *Belger v. Dinmore*, 51 Barb. 69; *Sweet v. Barney*, 23 N. Y. 335; *Verrier v. Sweetzer*, 82 Penn. St. 208; *Southern Express Company v. Newby*, 36 Ga. 635.

The general owner of goods who has employed an expressman to transport them for hire may maintain an action against the carrier employed by such expressman, and who are the proprietors of a conveyance upon which the same is transported, for its loss through the fault or negligence of such proprietors or other agents. But in such case the rights of the general owner are controlled by a valid contract between the expressman

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and the carrier employed by him. A stipulation, however, in such a contract that the carriers are not to be responsible, in any event, for loss or damage, cannot be construed to exonerate them for losses caused by their own negligence. This was distinctly held in the leading case of *The New Jersey Steam Navigation Company v. Merchants' Bank*, 6 How. (U. S.) 344; *Bazendale v. Western Railway Company*, 5 C. B. (N. S.) 336; *Garton v. Bristol and Exeter Railway Company*, 7 Jur. (N. S.) 1234; *Bradley v. South-eastern Railway Company*, 9 Jur. (N. S.) 309; *Langworthy v. New York and Harlem Railroad*, 2 E. D. Smith, 195.

It is very conclusively settled that a carrier cannot discharge himself from responsibility for the consequences of his own fault or negligence, or that of his servants. See the cases cited on that point in the note to *Grace v. Adams*, 1 Am. Rep. 132; also *Ashmore v. The Pennsylvania Central Railway Company*, 4 Dutch. 180; *Davidson v. Graham*, 2 Ohio St. 181; *Graham & Co. v. Davis*, 4 Id. 362; *Judson v. The Western Railroad Company*, 6 Allen, 486; *Camden and Amboy R. R. Company v. Baldouf*, 16 Penn. 77; *Pennsylvania Railroad Company v. McCloskey's Administrator*, 23 Id. 523.—REF.

LAWRENCE V. THE WINONA AND ST. PETER RAILROAD COMPANY, appellants.

(15 Minn. 390.)

Carriers' liability for non-delivery to connecting lines.

While in the absence of a special agreement a carrier is only liable to the extent of his route, and for safe storage and delivery to the next carrier, yet if he store the goods in his own warehouse at the end of his line without delivery or notice, or attempt to deliver to the next carrier, his liability as a carrier will continue.

The defendants—common carriers—received for transportation, from a connecting carrier, goods marked for M., a point beyond their line. On the arrival of the goods at W., the terminus of defendants' line, they were stored in their warehouse, where they were destroyed by fire. Some time previously the defendants, for the purpose of increasing the business of their road by drawing off the freight for M. for another road to M., connecting with their road at an intermediate point, had agreed with P., another carrier, that they would deliver to him all freight consigned to M., provided he would convey it regularly and at certain rates from W. to M., and, in pursuance of this agreement, it was their custom to store all such freight in their warehouse until a load accumulated, when P. would send a team and take it. The plaintiffs' goods were so stored at the time of their destruction; but no notice thereof was given to P. nor to the consignee. In an action to recover the value of the goods, held, that the defendants were liable as common carriers.

APPEAL by the defendants from a judgment rendered against them in the district court.

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Mitchell & Yale, for appellants.

Judson Jones, for respondent.

RIPLEY, C. J. This action was brought to recover the value of five boxes of household goods, the property of plaintiff, which were in defendants' warehouse at Waseca, in this state, when, on the 17th day of March, 1869, the said warehouse with its contents was wholly destroyed by fire.

At the trial in the district court for Blue Earth county, at December term, 1869, the plaintiff had a verdict, and defendants moved for a new trial, on the ground that the verdict was not justified by the evidence, and was contrary to law, and also of errors in law occurring at the trial and excepted to by defendants, which motion was denied, and judgment entered on the verdict, from which judgment the defendants appeal to this court.

The following facts appear to have been either proved or admitted. The plaintiff, on the 2d March, 1869, at Fort Howard, Wisconsin, shipped said goods on the Chicago and North-western Railway, taking the following receipt:

FORT HOWARD, Wisconsin, March 2, 1869

Received from J. B. Lawrence, in apparent good order, by the Chicago and North-western Railway Company, to be transported to Watertown, Wis., the following articles, as marked and described below, subject to the conditions and regulations of the published freight tariff of the said company, it being expressly agreed and understood that the said Chicago and North-western Railway Company, in receiving the said packages to be forwarded as aforesaid, assume no other responsibility for their safety than may be incurred on their own road.

Marks and consignee: J. B. Lawrence, Minn.

Description of articles as given by consignee: Five boxes H. H. goods.

W. E. PEAK, Agent

On the 11th day of said March the defendants received said goods at Winona, from Seavey & Co., the then transportation company between La Crosse and Winona. Defendants were then a corporation, duly incorporated under the laws of this state, and the owners of a railroad therein, known as the Winona and St. Peter railroad, extending from Winona aforesaid to Waseca aforesaid, and common carriers for hire upon said railroad. There was then a railroad connection between Owatonna, a point between said *termini* on defendants' road and Mankota, by way of Mendota. It was then

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the invariable custom of defendants to ship freight, marked as consigned to Mankato, by way of Waseca, unless it was specially consigned by way of Owatonna and Mendota.

Plaintiff's goods were not so specially consigned, but received by defendants without any special directions given by any one as to the route by which they were to be conveyed, or any direction other than that they were marked "J. B. Lawrence, Mankato, Minnesota."

Said goods were forwarded by defendants on the 12th March, 1869, to Waseca, where they arrived the same evening, and were unloaded and placed in said warehouse, which was the defendants' only freight depot, where they remained without being called for by the consignee or any other person till they were destroyed as aforesaid. The said building was constructed and arranged in the usual manner in which depots or station-houses are built in Minnesota.

Defendants gave no notice to plaintiff of the arrival of said goods at Waseca, and there is no evidence tending to show that they knew what his then place of residence was, which appears from the evidence in the case to have been at Chippewa City, Wisconsin.

Defendants' usual course of business, as to freight for Mankato, was to unload it the same night it arrived, and store it in said warehouse till called for.

Defendants admitted that S. S. Phelps, if produced as a witness, would testify as follows: "During the year 1868, and about the month of December, and when the western terminus of defendants' road was at Waseca, the defendants, being desirous that there might be established some freight transportation line between said Waseca and Mankato, so as to thereby encourage the consignment of a larger amount of Mankato freight over defendants' road, solicited said Phelps to put on a line of teams, and engage in the transportation business between Waseca and Mankato, and stating, as an inducement, that if he would do so they would give and deliver to him all 'Mankato freight' which might arrive at Waseca over their road, not otherwise ordered or directed by the consignees, provided said Phelps would not charge the consignees or owners of the freight over sixty cents per hundred pounds for transportation from Waseca to Mankato. The said Phelps thereupon put on teams on the route between Waseca and Mankato, and engaged in the business of the transportation of goods and merchandise between these points during the winter last past (1868-9). The manner of conducting the business was as follows: Whenever enough of Mankato freight

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had accumulated in the defendants' depot at Waseca to make at least one load, and which had not been otherwise ordered by the consignees, said Phelps would send his teams to Waseca and call for the said freight. Upon his application defendants' station agent would deliver such freight to him or his teamsters, he signing a receipt therefor.

The freight money, or back charges on such goods, due defendants were either paid by, or charged to him on defendants' books, upon delivery of the goods, he becoming personally responsible to defendants for such freight and charges. The defendants had no control over the teams, or employees of Phelps engaged in said transportation business, nor over the times when he should call for freight. He had no regular times of making trips between Waseca and Mankato, but was in the habit of doing so, when, and as often as, there was freight enough to make a load, or more. The defendants were not to pay Phelps any thing, or in any way become responsible to him for the transportation of freight, he having to look for his own pay, and back charges advanced by him to defendants, solely to the consignees or owners of the freight, which he usually collected of them at Mankato, on delivery of the goods.

Defendants had no interest in, nor received any part of, the moneys earned in the transportation of freight between Waseca and Mankato, nor did they make any charge for storage on such freight while in their warehouse at Waseca awaiting transportation. Phelps had no warehouse or other place for receiving or storing freight at Waseca, but whenever called for by him, it was delivered to him by defendants' station agent, into his wagons directly from the warehouse of defendants, in which it remained stored until so called for. He did not call for or take away any goods or other freight from defendants' warehouse at Waseca, after the arrival of plaintiff's goods at that point, until after the burning of the warehouse or depot, for the reason that there was not enough for a load for a team.

By "Mankato freight" he means freight marked or consigned to Mankato. Defendants had no interest in getting Phelps to engage in the transportation of goods between Waseca and Mankato, nor any interest in carrying on such business, except incidentally from the fact that the existence of such transportation line, at reasonable rates, induced more business to come over their road. Phelps' custom was, when freight arrived at Mankato, if it belonged to business men in Mankato, to take it directly to their place of business and

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deliver it; if it belonged to those who had no place of business there, he stored it in Shawbut's warehouse in Mankato."

Upon the foregoing facts, the truth of what Phelps would have stated being assumed, we think it has no tendency to prove (as claimed by respondent) that Phelps was an employee of defendants, and his teams a continuation of defendants' transportation line. Further to support the issue in this behalf, however, the plaintiff introduced, the defendants' objection thereto being overruled by the court, the testimony of the Mankato warehouseman, Shawbut; of one Palmer, who succeeded him in such business (for the purpose of proving Phelps' custom or manner of doing business at Mankato); also, the declaration of one Mead, defendants' general freight agent; also, the receipt [Exhibit B.], and eight papers of like form, dated between May 25, and June 26, 1869.

The material portion of said testimony with reference to plaintiff's claim is as follows: Shawbut testified that Phelps hauled goods all winter, and until he (Shawbut) turned over the warehouse to Palmer; that Exhibit B. was the usual form of way bill, or receipt which accompanied the goods which Phelps stored with him.

Exhibit B. is in the words and figures following:

H. Hampton, St. Peter,			To Winona and St. Peter Railroad, Lr.			
Way bill 126, } From car 166. }			For transportation of freight from Owatonna to Waseca.			
No. pack.	Description of articles.	Weight.	Rate.	Freight.	Adv. Charges.	Total
1.	Stand.	20.	5.	30 cts.	75 cts.	\$1 05
					Teams,	50
						\$1 55
Received payment,			H. J. WADSWORTH, Agent.			

He (Shawbut) received these bills of Phelps, and paid Phelps, and collected them afterward of the parties. The charge for hauling goods from Waseca was 60 cents per 100 pounds. "I do not remember," he says, "of receiving any letter from H. J. Wadsworth relating to storing goods for defendants; I never received any letter from any agent of defendants concerning the warehousing of goods. There was never any arrangement between me and defendants in regard to storing goods freighted over defendants' road. It was generally known that I was in the warehouse business, and when goods came to me, I took them. I took goods that Phelps brought

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me the same as from any one else. I continued to receive such goods until I rented my warehouse to Palmer, which was in April or May last. Phelps brought teams over once a week, and sometimes oftener; sometimes as many as two or three teams at a time. He always showed his receipts when he left goods. He usually left some goods with me whenever he came over. I always charged storage to persons who stored goods with me."

J. W. Palmer stated that he leased Shawbut's warehouse about last of April, or first of May, 1869. Phelps was then hauling freight, and did so for some months after. "Phelps came five or six times while I had charge of the warehouse. He usually left some freight with me, accompanied with waybills. 'Exhibit B.' is similar to those that he left with the goods." (Here eight papers of like form with Exhibit B were shown to witness, all dated between May 25 and June 26, 1869), which he said were papers which Phelps left with him with the goods. "I stored the goods referred to in these bills. They were delivered to me by Phelps. Phelps' charge averaged about sixty cents per hundred pounds." On cross-examination, this witness stated that he might have received some bills from Phelps that had not the word "team" on it, and also that "the bill I hold in my hand has not the word 'team' on it; it is one I received from Phelps. I don't remember receiving but one bill from Phelps without the word 'team' on it; there might have been others." Re direct: "The bill I refer to as received without the word 'team' on it is signed 'L. W. Rowley, agent.'"

J. F. Wallace, a grocery merchant in Mankato, testified, that, about December, 1869, said A. J. Mead asked him to ship freight over their road. "I told him freight was too high from Waseca to Mankato, but if that could be remedied, I should ship more goods that way. He replied, that is just where the thing hangs; if more goods were shipped that way, it might enable us to secure a reduction of rates of freight to Mankato. He also said he would try to get rates reduced, and asked me to use my influence to have freight pass over their road."

He also stated that he received goods from Phelps at his store in the winter of 1868-69, and one of said bills, dated June 20, being shown him, that the same was similar to those he received.

The evidence of Phelps' manner of doing business at Mankato should have been excluded. Unless he was the defendants' agent, it was irrelevant; and before the act of B. can be given in evidence

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as the act of A., it must be proved that B. was the agent of A. Starkie, Pt. 4, p. 55. The plaintiff claims, indeed, that the evidence in question itself tends to prove this; but the agency of a party must be proved from other evidence than his acts before it can be shown that his acts are binding upon his alleged principal. *Scott v. Crane*, 1 Conn. 255. B.'s authority to act for A. may be inferred from the habit and course of dealing of A. and B., but not of B. alone, even though his acts be done in A.'s name. Starkie, Pt. 4, pp. 55, 59. In this case Phelps did not assume to act in the name of the defendants. Plaintiff would infer Phelps' agency, from the fact that the way-bill, which he usually left with the goods, was signed by defendants' freight agent, and included a charge for team, as well as railroad charges.

The bearing of the way-bill was Phelps' act; its delivery to him was the act of defendants' freight agent. On its face it purports to be for transportation to Waseca only, and its delivery, receipted by the station agent, to Phelps (it appearing, according to the evidence introduced by plaintiff himself, that the freight was delivered to Phelps by the station agent, upon his receipting therefor, and either paying or becoming personally responsible to defendants for the freight money and back charges due them), tends of itself to prove that such goods and way-bill were delivered to him, not as defendants' employee, but as the agent of the consignees. It appears, however, that these way-bills usually, but not always, included a charge for "*team*," additional to defendants' dues, which is said, though of this there is no proof, to be for hauling from Waseca to Mankato. Whether added by the freight agent, and, if so, at whose direction or request, or by Phelps himself, does not appear; but, at all events, there is no inference from the circumstances that Phelps received the bill as defendants' agent, to collect the amount for them, and on their account, for the plaintiff has himself introduced positive testimony that the defendants had no interest in, nor received any part of, the moneys received on the transportation of freight between Waseca and Mankato. The evidence of Palmer was inadmissible, for the further reason that he testified only to facts occurring after the fire; and Phelps' way of doing business at Mankato in May could have no tendency to prove what it was in March. Mead's declarations, though of themselves, indeed, they rather go to show that defendants had no control over the rates of freight between Waseca and Mankato, yet were inadmissible in any view. They

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did not tend to prove any contract with plaintiff, or any usage of defendants. There is no evidence, either that the matters in question were within the scope of his agency, or that the declarations were in regard to a transportation then depending so as to be part of the *res gestæ*. 1 Greenleaf Evid., sub. 113.

We think, however, that there is competent evidence in the case tending to show that Phelps was an independent common carrier. In that case defendants were intermediate carriers between Fort Howard and Mankato. If they were, were they under any responsibility to plaintiff at the time of said fire in respect to such goods? If so, what was it?

It is held in England, and in some of the states, and is laid down by Mr. Angell, that persons receiving goods as common carriers continue to be responsible, in that capacity, until the goods are delivered at the place to which they are directed, though it is beyond the limits of the place to which they are accustomed to carry and deliver (Angell on Carriers, § 95 [4th ed.], 1868; *Muschamp v. Lancaster & Preston Railway*, 8 M. & W. 421; *Bennett v. Filyar*, 1 Fla. 403; *Choteaux v. Leach*, 18 Penn. St. 224; *Ill. Cent. R. R. v. Johnson*, 34 Ill. 389); that by receiving goods marked for places beyond their route they are impliedly bound to see them carried to their destination. *Muschamp v. Lancaster and Preston Railway*, 8 M. & W. 421; *Watson v. Ambesgate, Nottingham and Boston Railroad Co.*, 3 Eng. Law and Eq. Rep. 497; *Ill. Cent. Railroad v. Johnson*, 34 Ill. 389. But this rule applies to the first carrier only, and not to any subsequent or intermediate carrier. The contract is held to be exclusively with the first carrier, and there is no right of action in favor of the owner against any of the subsequent carriers on the route, even where the loss is shown to have occurred on one of the subsequent roads on the route. *Bristol and Exeter Railway v. Collins*, 5 Hurl. & Norm. 969. It is said in an able article, in support of the rule, that "this liability of the first carrier who receives the goods may truly be called the bond upon which the consignor invests, and as the first carrier is the only party he deals with, so he must be the only party to whom he can resort for the condition of his bond." 2 Am. Law Rev. 440.

Upon this view of the law, as plaintiff's contract was with the Chicago and Northwestern railroad, his only remedy would be against them, even though the terms of their receipt would be a bar to any

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action against them. *Coxon v. G. W. R. R. Co.*, 5 Hurl. & Norm. 274; *Bristol & Exeter Railway v. Collins*, id. 969.

On the other hand, it is stated by Judge Redfield, that the general view of the American cases, and the more just and reasonable rule, and the doctrine which seems likely to prevail in this country, is that laid down in the earlier English cases, viz.: that, in the absence of special contract, the carrier is only liable for the extent of his own route, and for the safe storage and delivery to the next carrier. 2 Redfield on Railways, ch. 26, sec. 14, §§ 180, 182, and cases cited; *Garside v. Trent & Mersey Nav. Co.*, 4 T. R. 581.

So STORY states, "That the American rule probably is, that if the carrier receiving the goods has no connection in business with another line, and receives pay for transportation only on his own road, he is not liable, in the absence of any special contract, for a loss beyond his own line; and the simple receipt of goods directed to a place beyond does not, *prima facie*, create a contract to carry such goods to their final destination." Story on Bailments (ed. 1863), § 538. The rule laid down in *Garside v. Trent & Mersey Nav. Co.*, that each carrier, in the absence of special contract, is only liable to the extent of his own route, and the safe storage and delivery to the next carrier, is said by the supreme court of Vermont (23 Vt. 186) to be "undoubtedly the better, the more just and rational, and the more generally recognized rule upon the subject," and what is called the "American rule," seems to be based on that case. See 2 Redfield on Railways, *supra*, and *Thomas v. Bost. & Prov. R. R.*, 10 Met. 472. The question is new in this state, but, after giving it all the consideration due to its great interest and importance, we feel ourselves constrained to take our place with the adherents to the "American rule," as above stated. But though he is not liable beyond his own route, yet, if, at the end of the route, the carrier stores the goods in his own warehouse, without delivery, or notice, or attempt to deliver to the next carrier, he is not, by such mere act of storage, released from liability as a carrier. *McDonald v. W. R. R.*, 34 N. Y. 497, 500.

In *Garside v. Trent & Mersey Nav. Co.* the defendants were common carriers between Stonepoint and Manchester. Plaintiff's goods were taken at Stonepoint to be carried to Manchester, and from Manchester by another carrier to Stockport, and, by agreement, they were to be kept in defendants' warehouse without charge, and to be kept till called for by the carrier for Stockport; and it was held, that

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their duties as carriers ended with the storage of the goods and that they were thereafter in the situation of warehousemen only. BULLER, J., remarked: "The keeping of the goods in the warehouse is not for the convenience of the carrier, but the owner, for when the voyage to Manchester is performed, it is the interest of the carrier to get rid of them directly, and it was only because there was no person at Manchester ready to receive these goods, that the defendants were obliged to store them."

The defendants contend that the facts in the case at bar bring it strictly within the doctrine in the above case. Though the defendants did not deliver the goods, there was, they say, no opportunity to deliver them; for Phelps did not call for any while they were stored in their warehouse; nor had he any place for their receipt. The goods, it is said, were stored, not for defendants' convenience, but because there was no one to receive them, or to whom they could be delivered.

But this, it seems to us, assumes the very point upon which the question turns. In *Garside v. Trent & Mersey Nav. Co.*, the storage was for plaintiff's convenience, because, by agreement with him, the defendants had precluded themselves from delivering them to the next carrier elsewhere than at their warehouse. They were bound to keep them there till called for. It is true, that the defendants in the case at bar had a right to presume that the plaintiff intended they should transport and dispose of the goods in the usual way, and that the contract between them would be implied to be, that defendants were only bound to transport and deliver them according to the established usage of the business, whether plaintiff knew it or not (*Van Santvoord v. St. John*, 6 Hill, 157); that established usage, too, included the storage in defendants' warehouse, until enough freight having been accumulated for a load, Phelps should call for them. It may be said then to have been by agreement with the plaintiff, that the defendants so stored the goods; but it would not follow from that circumstance that such storage was for *his* convenience. They were as much bound in respect to Phelps, by the custom of conducting business, as the plaintiff to them.

By their agreement with Phelps they had precluded themselves from delivering the goods to any other carrier than himself, and by their customary mode of doing the business with him under that agreement they were bound to keep such freight for him as aforesaid. Phelps never received the goods till enough had accumulated

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for a load, and was not bound to receive them sooner. Defendants never delivered, and could not insist on delivering, them sooner, and the plaintiff's goods were destroyed because of this arrangement; so: the case finds that Phelps had not called until after the fire, because *there was not enough for a load*. It makes no difference, if the fact were so, though that does not appear, that there was no other carrier at Waseca than Phelps to whom the goods could have been sooner delivered. There was another independent line for Mankato connecting with defendants' road by rail at Owatonna; but defendants' established usage was to forward them by Phelps, *via* Waseca. By this usage plaintiff of course was bound; but was this custom, and this agreement with Phelps under which plaintiff's goods were so disposed of, for *plaintiff's* convenience? Surely not. The arrangement with Phelps was made by defendants in their interest, and for their benefit, viz.: to procure the consignment of a larger amount of Mankato freight over their road.

The general interest of carriers is, as Mr. Justice BULLER says, "to get rid of the goods directly the journey is performed." But here the expected benefit above mentioned had made it defendants' interest to make arrangements which necessarily included a temporary retention of the goods by them. It is as if defendants, on receiving plaintiff's goods, had said: "we intend, instead of sending your goods to Mankato, *via* Owatonna, to transport them to Waseca, keep them in our warehouse till enough of such freight has accumulated for a load, and then deliver them to Phelps, to whom alone we have agreed to deliver them, in consideration of his putting on teams, and engaging in the transportation of freight between Waseca and Mankato, at our request and for our benefit;" and plaintiff assents.

But it is not *his* convenience that is consulted in this arrangement, but that of the defendants. They carried the goods past Owatonna to Waseca, and stored them there for their own convenience, and for the purpose of, and until, delivery to Phelps, under their arrangement with him; such storage was but an accessory to defendants' carriage; simply one step on their established course of the transport and delivery of such goods, which were still in transit, and defendants' liability as carriers in respect thereof still existed when they were burned. 3 Kern. 569; 34 N. Y. 497, 506; 6 Hill, 157. With regard to the release set up in the answer, we do not think the case discloses any evidence tending to show that the plain-

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tiff ever executed it. It is not, therefore, necessary to consider its effect.

It is unnecessary, also, to consider the other questions raised and arising on the rulings and charge of the court; for the evidence shows, in our opinion, as matter of law, that defendants' liability at the time of the fire was that of common carriers; supposing them, that is, to be intermediate carriers between Fort Howard and Mankato, which, we think, the evidence was competent to establish; Phelps' teams being, in our view, an independent line of carriers between Waseca and Mankato.

The judgment of the district court must therefore be affirmed.

Affirmed.

NOTE.—See *Burroughs v. Norwich and Worcester Railroad Company*, and note, 1 Am. Rep. 76. Also *Nashua Lock Co. v. Worcester and Nashua R. R. Co.*, *post*. 242.

That a carrier receiving goods is not, in the absence of any special contract, liable for a loss beyond his own line, where he receives pay for transportation on his own line only, and has no connection in business with the connecting line, even though the goods be marked for a point beyond his line, has been held in the following additional cases: *Carter v. Peck*, 4 Sneed, 203; *Elmore v. Naugatuck Railway*, 23 Conn. 457; *Jennison v. Camden and Amboy Railroad Co.*, 4 Am. Law Reg. 224; *Angle v. Mississippi Railway*, 9 Iowa, 498; *Naugatuck Railroad Co. v. Waterbury Button Co.*, 24 Conn. 468; *Converse v. Norwich and New York Transportation Co.*, 33 Id. 179; *McMillan v. Michigan Southern Railroad Co.*, 16 Mich. 119; *Brintnal v. Saratoga and Whitehall Railroad Co.*, 22 Vt. 665; *Perkins v. Portland and Saco Railroad Co.*, 47 Me. 573.

Some of the American courts, however, have held carriers liable where the goods were marked beyond their line. *Mosher v. Southern Express Co.*, 38 Ga. 87; *Southern Express Co. v. Shea*, Id. 519; *Foy v. Troy and Boston Railroad Co.*, 24 Barb. 382; *Kyle v. The Laurens Railroad*, 10 Rich. Law, 282. In *Angle v. The Mississippi and M. R. R.*, 9 Iowa, 457, the court says: "When a common carrier receives goods marked for a particular place beyond the terminus of his route, unaccompanied by any direction as to their transportation and delivery, except such as may be inferred from the mark, he is *prima facie* bound to carry and deliver them according to the mark."

Although a carrier may not be liable beyond his route without a contract to that effect, yet such contract may be implied from circumstances, and without an express stipulation to that effect. *Najae v. Boston and Lowell Railroad Co.*, 7 Allen, 329; *Morse v. Vermont and Canada Railway Co.*, 41 Vt. 550; *Cutts v. Bratnard* (Vt.), 1 Am. Rep. 353. As when a carrier has been in the habit of receiving and forwarding goods directed to any particular place, an agreement on his part to take them there. *St. John v. Van Santvoord*, 6 Hill, 158. But see *Burroughs v. Norwich and Worcester Railroad Co.*, *supra*.

When several carriers are associated in a continuous line of transportation, and in the course of business goods are carried through the connecting line for one price under an agreement by which the freight money is divided among them in proportions fixed by the agreement, if the carrier at one end of the line receives goods to be transported, though marked for a consignee at the other end of the line, and on delivery of the goods takes pay for transportation through, the carrier who so receives the goods is bound to carry them or see that they are carried to their destination, and is liable for any accidental loss happening in any part of the connected line. *Nashua Lock Co. v. Worcester & Nashua R. R. Co.*, *post*, p. 242; *Champton v. Bowditch*, 11 Wend 571; 18 Id. 174; 2 Redfield on Railways, 104. And this liability may attach without an express and technical partnership, as where one carrier receives pay for the transportation over his own and the connecting line. *Weed v. The Saratoga & Schenectady R. R. Co.*, 18 N. Y. 241.

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nectady R. R. Co., 19 Wend. 584; *Wilcox v. Parmelee*, 3 Sandf. 610. This doctrine was recognized in *Van Santvoord v. St. John*, 6 Hill, 158; see, also, *Quimby v. Vanderbilt*, 17 N. Y. 315; *Burtis v. The Buffalo & State Line R. R. Co.*, 24 id. 269, 278; *Choteaux v. Leach*, 18 Penn. St. 224; *Baltimore & Phila. Steamboat Co. v. Brown*, 54 Penn. 77; *Carier v. Peck*, 4 Sneed (Tenn.), 203. The rule, however, seems to be in Massachusetts that nothing but a special agreement will render a carrier liable beyond his own line. See *Burroughs v. Norwich & Worcester R. R. Co.*, 1 Am. Rep. 73; *Darling v. The Boston & Worcester R. R. Co.*, 11 Allen, 295. The same doctrine is held in Connecticut. *Hood v. New York & New Haven R. R. Co.*, 23 Conn. 1; *Elmore v. Naugatuck R. R. Co.*, 23 id. 457; *Converse v. The Norwich & Worcester Transportation Co.*, 33 id. 169.—RMP.

LASH V. LAMBERT *et al.*

(15 Minn. 418.)

War, effect of on contracts for interest.

On the 14th of August, 1860, the plaintiff loaned the defendant, a citizen of Minnesota, the sum of \$17,000, upon a bond and mortgage on lands in that state, conditioned for the payment of the principal in five years, with interest, payable semi-annually. The plaintiff was, at the time, a resident of North Carolina, and so continued to the date of the action, and not there nor elsewhere engaged in the service of the United States, but during the whole period he had an agent in the state of Minnesota. In an action brought to foreclose the mortgage, *held*, that the plaintiff was entitled to recover the interest accruing on the bond during the rebellion and before maturity.

THIS was an action brought to foreclose a mortgage executed by Mary S. Lambert and husband to the plaintiff. Both of the mortgagors having died, the action was brought against their heirs. The court below gave judgment for the plaintiff, and the defendants appeal to this court. The facts are stated in the opinion.

Smith & Gilman, for appellants:

The court erred in allowing interest during the continuance of the war.

A state of war suspends all contracts between citizens of the respective belligerents during its continuance. *Griswold v. Waddington*, 16 Johns. 438. This principle operated in full force during the late rebellion. *The Prize Cases*, 2 Black, 635; *Mrs. Alexander's Cotton*, 2 Wall. 404; *The Venice*, id. 258; *The Hampton*, 5 id. 372; *The William Bagaly*, id. 377; *Hanger v. Abbott*, 6 id. 532. While the remedy to enforce a claim is suspended, interest upon the

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claim is also suspended. *McCall v. Turner*, 1 Call. (Va.) 133; *Brewer v. Hustie*, 3 id. 22; *Hoare v. Allen*, 2 Dall. (Penn.) 102; *Foxcraft v. Nagle*, id. 132; *Conn. v. Penn.*, 1 Pet. C. C. 496.

Allis, Gilfillian & Williams, for respondent.

RIPLEY, C. J. The judge who tried this case, without a jury, finds that on the first day of August, 1860, the plaintiff lent one Mary S. Lambert the sum of \$17,000, upon a bond executed by herself and Henry A. Lambert, her husband, in the penal sum of \$34,000, conditioned for the payment of said \$17,000 in five years from that date, with interest at the rate of 12 per cent per annum, payable semi-annually, and secured by mortgage upon real estate in the city of St. Paul, and an assignment of all leases then made, or which should thereafter be made, of the three westerly buildings on said mortgaged premises, and all the rents, issues and profits thereof, to be applied by plaintiff to the payment of said interest, as it accrued and became due and payable, and all expenses incurred by plaintiff upon the buildings situate upon said premises, said assignors agreeing that plaintiff should cause the said buildings to be insured to the amount of \$12,000, and pay the expenses thereof out of said rents; that plaintiff by his agent, one Caldwell, went into possession of said premises under said assignment, and collected the rents of said premises up to July, 1864, to the amount of \$6,231.37 and expended thereof for repairs and insurance upon said mortgaged property the sum of \$830.70; that thereafter, till the 31st of December, 1866, plaintiff, by his agent Lorenzo Allis, continued to collect the rents under said agreement, and received therefor \$5,333.50, and expended for taxes, insurance and repairs upon said premises the further sum of \$3,166.61; that on said first day of August, 1860, plaintiff was, and ever since has been, a citizen, resident and inhabitant of the state of North Carolina, and not there or elsewhere engaged in the military service of the United States, and owned property in the state of Minnesota to the amount of \$20,000, and did so far aid and abet the late rebellion against the government of the United States; that no other proof was given as to whether or not the plaintiff did aid and abet the said rebellion; that from said day to July 18, 1864, the plaintiff had an agent residing in St. Paul, viz.: said Caldwell; and that from that time until the 31st of December, 1866, said Allis,

who, during all that time, was a resident of St. Paul, acted as plaintiff's agent.

The said judge also found that the amount of principal and interest due and unpaid upon said bond and mortgage is the sum of \$27,422.44, for which judgment of foreclosure and sale was entered, from which defendants appeal.

In calculating the amount due, the district judge has allowed interest at the rate of twelve per cent per annum after maturity, as well as before, and has deducted from the rents collected the amounts above specified as paid by plaintiff's agents for taxes, repairs and insurance.

The appellants contend that the court erred: . 1st. In allowing any interest during the rebellion, *i. e.*, from April 15, 1861, to the president's proclamation of May 29, 1865.

2. In allowing interest at twelve per cent per annum after maturity.

3. In allowing for repairs.

The 2d and 3d objections are well founded. The statute in force at the date of the bond reads as follows: "Interest for any legal indebtedness shall be at the rate of seven dollars for one hundred dollars for a year, unless a different rate be contracted for in writing, but no agreement or contract for a greater rate of interest than twelve dollars for every one hundred dollars for a year shall be valid for the excess of interest, over twelve per cent, and all agreements and contracts shall bear the same rate of interest after they become due as before, if the same shall be clearly expressed therein, *provided*, the same shall not exceed twelve per cent per annum." Statutes 1860, chap. 56, sec. 1.

This bond is conditioned to be void on payment of \$17,000 in five years, with twelve per cent interest per annum, payable semi-annually.

There is here no stipulation that if the bond should become forfeited by failure to perform such condition, interest should run thereafter at twelve per cent per annum, or any other rate.

There is nothing to take it out of the settled rule in this state, that the contract for interest ceases at maturity, and that thereafter interest is allowed as damages.

As to repairs, the general rule is, that a mortgagee will be allowed for all necessary repairs on the tenement of which he is in possession. The court below does not find that the repairs allowed for

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were repairs necessarily made on the three westerly buildings, of which plaintiff was in possession. This is the fact which warrants their allowance, and it should appear affirmatively in the finding, and especially because, whether they are necessary depends in each case on the particular circumstances thereof. *Dexter v. Arnold*, 2 Sum. 125, 126; *Green v. Lewis*, id. 643.

As to interest accruing, on the special contract therefor, during the rebellion, before maturity, we think it was properly allowed. "A class of cases occurred after the revolutionary war, in which it was held, that interest was not demandable for the period during the war, where the citizen was in the enemy's country, or with the enemy, and had no known agent in the country competent to receive payment and give a valid discharge, because, as all intercourse was prohibited by the existence of the war, the payment of the principal was prevented by law." 1 Am. Lead. Cas. 528, and cases cited. As far as we can ascertain, these cases all differ from the one at bar in that the debts were due before the war. Neither, it may also be noted, was there any express contract for interest after maturity. But in the case of *Shortridge v. Mason*, in the U. S. circuit court for North Carolina (2 Am. Law Rev. 95), CHASE, C. J., held, that these cases were inapplicable to the case of a debt due from a citizen of North Carolina to a citizen of Pennsylvania, and that interest thereon was not suspended during the rebellion. This was obviously correct, for it was the treason of the rebel that brought about the prohibition of intercourse that followed upon the outbreak of the rebellion.

To claim exemption from the payment of interest on the ground that he was not in default in not paying, because the law had prevented him from so doing, would be to take advantage of his own wrong. *Harper et al. v. Ely*, Cook Co., Ill., Circuit Court, July 26, 1870. Reported Chicago Legal News of July 30, 1870. Nevertheless, we think the principle on which the cases first referred to are based would be applicable to the case of debts due from citizens of the United States to the citizens of the rebel states.

It was no fault of loyal citizens that all intercourse became unlawful between themselves and the rebels; that all such was prohibited by positive law. See act of Congress, July 13, 1861. In the words of the case last cited, "numberless cases can be found which assert that laches during war will not be imputed by any state to its own loyal citizens."

"If, therefore, plaintiff's debt had been due at the outbreak of the rebellion, and he had no known agent residing in Minnesota authorized to receive payment, we think he should not have been allowed now to recover interest thereon for the time of the war; but that the defendants might well have pleaded that they had been prevented by law from paying, and, therefore, in no default for not paying. Where this is the case, interest is not due; interest after a debt is due being given by law, as damages for default in not paying. 1 Am. Lead. Cases, 526, 803; *Prescott v. Parker*, 4 Mass. 170.

But in the case at bar, not only did the principal debt not fall due till after the rebellion had been put down, but there was an express agreement to pay interest at twelve per cent per annum till the principal became due. It is not, therefore, within the reason of the rule.

The payment of the principal debt has not been prevented by law; the payment of the semi-annual interest at twelve per cent per annum, as it accrued by virtue of the special contract, was; but on these installments no interest or damages for such default has been allowed or is claimed.

There is another principle, indeed, to the operation of which is due an exception to the rule, that interest is not recoverable when the payment of the debt has been prevented by law, viz.: that interest will be allowed *in all cases* where there is an express contract. *Selleck v. French*, 1 Conn. 32; 1 Am. Lead. Cases, 500.

Therefore, though the payment of a debt be prevented by law, yet, if such debt bear interest by agreement, interest is recoverable, unless the use of the money by the debtor has been actually prevented. *Adams v. Cordis*, 8 Pick. 260; 1 Am. Lead. Cases, 528.

In *Adams v. Cordis*, one summoned as trustee (garnishee), was indebted to the principal defendant, upon a balance of account, which, by agreement, drew interest till paid at five per cent. He continued, after service of the writ upon him, to use the money in his business, and was held chargeable with interest up to the time that the money was demanded, upon the execution against the funds in his hands. The court say in that case that "there is an important distinction between cases in which interest is given by way of damages, and those in which it constitutes a part of the debt, as contracts in which there is a promise to pay interest. In the former class it is obvious that where one is summoned as trustee

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he is in no fault for not paying, and, as he made no agreement to pay interest, he ought not to be charged with it; in the latter, the interest arising by virtue of the special contract therefor before the principal falls due is the debt as much as the principal, and he ought to pay it, unless the use of the money has been actually prevented."

The late case of *Ward v. Smith*, 7 Wall. 447, we think, supports our position, as does also the reasoning of the supreme court of Illinois, in *Mixer v. Sibley*, reported in 3 Chicago Legal News, No. 11, December 10, 1870.

The judgment of the district court must be modified in respect to the amount therein adjudged due to plaintiff, and the case is remitted to the district court, to ascertain the amount due, in accordance with the rules above stated, and the insertion of the sum so found in the judgment, in lieu of the sum of \$27,422.44, aforesaid.

Modified and affirmed.

WEMPLE V. KNOFF.

(15 Minn. 440.)

Evidence of parol contemporaneous agreement to revoke written instrument inadmissible.

In an action for goods sold and delivered, the plaintiff gave in evidence a written order, for the goods, signed by the defendant, and proved that they were delivered according to the terms of such order. The defendant thereupon offered to prove that at the time said order was made, as an inducement thereto, plaintiff verbally agreed with defendant that the latter might revoke the order during the summer and not take the goods, and that during the summer and before the delivery of the goods he did revoke said order. *Held*, that such offer was properly rejected.

ACTION in the nature of assumpsit for goods sold and delivered. The plaintiff recovered judgment in the court below, and the defendant brought this appeal. The facts are stated in the opinion.

Perkins & Mott, for appellant.

G. E. Cole, for respondent.

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BERRY, J. This is an action in the nature of assumpsit for goods sold and delivered. To make out his case, plaintiff introduced in evidence a document of which the following is a copy, viz.:

Mr. O. F. BRAND, of the North-western Faribault Nursery:

Please send me the following bill of nursery stock, to be delivered at Faribault, Rice county, Minn., during the months of October and November next. I agree to pay cash for all stock delivered at the price below mentioned, and, should I fail to pay for the same when delivered, interest shall accrue thereon from the date of delivery until fully paid at the rate of twelve per cent. (Here follows a schedule of the stock referred to in the order and the prices, amounting to \$68.00.)

(Signed.)

ADAM KNOFF, JR.,

Wheeling, Rice Co., Minn.

G. W. WEMPLE, Agent.

June 8, 1869.

It appears that the plaintiff was Brand's agent at the date of the order, and that he took the order as such agent; that as Brand's agent he solicited defendant to buy the trees; that the stock mentioned in the order was delivered at Faribault, in October, 1869; that the defendant was duly notified of the delivery; that payment of the price was demanded of the defendant after the delivery, and refused; that prior to the commencement of this action, Brand's claim had been duly assigned to plaintiff, and that there had been no acceptance of any of the stock by the defendant.

Upon this showing the plaintiff rested, and the defendant moved to dismiss the action, "on the ground that the said sale of stock was void by the statute of frauds." The motion was properly denied. There was an agreement signed by the party sought to be charged therewith in this action. As we have already held in *Morin v. Martz*, 13 Minn. 191, this satisfies the statute. See also *Chitty on Contracts*, 404, 405.

The order in this case is not a mere offer, as in *Lanz v. McLaughlin*, 14 Minn. 75, but it contains a positive and express agreement to pay a named sum for the goods ordered.

The motion to dismiss having been denied, "the defendant offered to prove that at the time the said order was made, as an inducement to the defendant to give it, the said Wemple agreed with the defendant that the latter might revoke the order during the summer of said year, and not take the trees, if he so desired;" and also "that during the said summer he did countermand the said order." Both

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offers were rightly rejected by the court. If the testimony offered had been received, it could only have been for the purpose of showing that the absolute engagement which the defendant had entered into by the terms of the order was not absolute, but conditional. This would be neither more nor less than a violation of the well-settled rule, that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." 1 Gr. Ev. § 475. It would be to permit the defendant to show that the agreement evidenced by the order was not the agreement of the parties, but that something entirely inconsistent with it was the agreement of the parties. We have examined *Clark v. Tappan*, 32 Conn. 56, cited by defendant's counsel, and are unable to see how the doctrines there laid down can take the case at bar out of the general rule above referred to. That was a case in which the defendant, being a member of a partnership, was released from all liability *as a member of such partnership*, in consideration of his individual promise to pay the amount of such liability. In an action brought upon the individual promise, oral evidence of such promise was received, and it was held that the release could not be introduced in evidence as a defense. The oral evidence was received upon the ground that the release was not, and did not purport to be, *the agreement* between the parties. It was simply an act done by one party in performance of an agreement anterior to it; and the release was very properly excluded, because it was a release of the defendant's liability *as a member of the partnership*, while the promise set up was one by which the defendant charged himself, not as a partner, but as an individual.

Oral evidence of the promise did not, then, tend to vary or contradict the terms of the release, and, as the release did not purport to discharge or extinguish any individual liability, it furnished no defense to the action. The case cited, then, is hardly an authority for the defendant's claim, that he should have been permitted to show, by parol evidence, that the written order which purported to be *the agreement* of the parties in the case was not such an agreement. It is argued by defendant that the testimony offered should have been received, because this was a case in which a *part only* of an entire verbal contract was reduced to writing. An exception to the general rule, on this ground, has been very generally allowed in particular cases. But, as remarked by Judge REDFIELD, in Gr. Ev. (12th ed.), § 284, a, this "is a qualification of the general rule which

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* * * it will be always difficult to apply in practice, without materially trenching upon the integrity of the rule itself."

We find no case going so far as the court below was asked to go in this instance. The English cases of *Pynn v. Campbell*, 6 Ell. & Bl. 370; and *Wallis v. Littell*, 11 C. B. (N. S.) 370, hold that parol evidence, showing that the commencement of the obligation evidenced by the writing was *suspended*, may be received, upon the principle upon which it may be shown that a deed was never delivered, or is an escrow, that is to say, upon the ground that there never was an agreement. The same cases, however, expressly distinguish the admission of oral testimony for the purpose of showing a *suspension* of the obligation of the agreement, from its admission for the purpose of showing a *defeasance* of the obligation of the agreement. The idea of admitting it for the latter purpose is repudiated; and yet this is the very purpose for which it must be admitted in the case at bar, if at all. So far as the point under consideration is concerned, it is not claimed that the written agreement in this case was not made by the parties, nor that its obligation did not commence immediately; but that by a prior or contemporaneous verbal agreement it was subject to be defeated by subsequent action upon the part of the defendant.

Judgment affirmed.

WELLER V. EAMES *et al.*

(15 Minn. 481.)

Bond of Indemnity — no recovery on, without actual damage.

The plaintiff had delivered to the defendants goods, subject to a lien for freight charges in favor of C.—from whom plaintiff had received them—without collecting such charges, upon receiving from the defendants a bond conditioned to indemnify the plaintiff "against any legal liability which he may have incurred" by so doing. Judgment was recovered by C. against the plaintiff for the amount of such charges and cost, but it did not appear that it had been paid. In an action upon the bond, *held*, that the plaintiff could not recover, as there was no proof of actual damage.

THIS action was brought upon a bond of indemnity. The facts appear in the opinion.

Weller v. Eames.

Allis Gilfillan & Williams, for appellant.

C. K. Davis, for respondent.

BERRY, J. Plaintiff was captain of the steamboat "Ben Campbell," upon which he transported for defendant Bowers a quantity of apples, which he, plaintiff, had received from the steamboat "Centralia," subject to a lien upon the same in favor of the "Centralia" for freight charges thereon. This claim of lien being disputed by Bowers, the plaintiff, without collecting said charges, delivered the apples to Bowers, upon receiving from him and his co-defendant Eames, a bond conditioned as follows: "Now, therefore, for the purpose of getting such apples from the possession of said John Weller, this bond is given to indemnify said Weller against any legal liability which he may have incurred to said steamboat "Centralia" by reason of having delivered said apples without having collected said back charges." Judgment for the amount of said charges, interest thereon and costs, was recovered by the owners of the "Centralia" against plaintiff, and one Deering, owner of the "Ben Campbell," in an action, of the commencement, pendency and object of which defendants had due notice. It does not appear that the judgment has been paid, nor that the plaintiff has suffered any actual damage in consequence of its rendition, or his liability for the charges aforesaid, or upon said judgment.

The plaintiff brings this action upon the bond, and we are of opinion that upon the facts stated it cannot be maintained.

"Indemnify" is defined by Webster to mean, "1. To save harmless; to secure against future loss or damage. 2. To make up for that which is past; to make good, to re-imburse." By Worcester it is defined to mean, "1. To secure against damage, loss, injury or penalty; to save harmless. 2. To compensate for loss or injury; to re-imburse; to remunerate." The word, then, appears to be used in two general senses: first, in the sense of giving security, which in a case like this at bar is done by the execution and delivery of a bond; and second, in the sense of compensating for actual damage. We think the latter sense is that in which the word "indemnify" must be held to have been used in the bond in this case. If, then, for the purpose of determining what obligation the defendants have assumed, we consult approved lexicographers, it would seem that, as the agreement to indemnify was an agreement to compensate for actual damage, this action cannot be maintained.

without proof of actual damage. And were the question presented *res nova*, and to be answered solely by a consideration of the natural and ordinary signification of the language employed, we should have had very little hesitation in arriving at the conclusion, that a covenant to indemnify against legal liability would be satisfied by compensation for all actual damage resulting from such liability. But there are not a few authorities having a bearing more or less direct upon the point in hand, and they are not all harmonious.

In a note to *Cutter v. Southern*, 1 Wms. Saund. 116, relied upon by counsel upon both sides in the case at bar, it is said: "In all cases of condition to *indemnify and save harmless*, the proper plea is *non damnificatus*, and if there be any damage the plaintiff must reply to it. This plea, however, cannot be entertained when the condition is to *discharge or acquit* the plaintiff from such a bond, or other particular thing, for then defendant must set forth affirmatively the special manner of performance. But it is otherwise where the condition is to discharge and acquit plaintiff from any damage by reason of such bond, or other particular thing, for that is in truth the same thing with a condition to indemnify and save harmless." And see *Andrus v. Waring*, 20 Johns. 161; *McClure v. Erwin*, 3 Cow. 332; *Wicker v. Hoppock*, 6 Wall. 94.

The rule thus laid down in the note of Serjeant Williams seems to us to be the true rule, and in harmony with the general principles and analogies of the law. No distinction is there taken between an agreement to indemnify against liability and an agreement to indemnify against damage. But the rule is laid down in general terms that where the agreement is to *indemnify, non damnificatus* is the proper plea; from which it follows that actual damage is necessary to support an action upon such agreement. It has been said (*Carr v. Roberts*, 5 Barn. & Adol. 78) that there is a distinction between "indemnify" and "save harmless," the latter phrase possessing the more extensive meaning; and if this be so, the necessity of showing actual damage, where the covenant is to "indemnify" only, is so much the greater. In the case at bar, the agreement is not "to discharge or acquit the plaintiff from such a bond, or other particular thing. It is not to *discharge or acquit* him from liability, but to *indemnify* him against liability. If the agreement had been to *pay* the liability, it would have been altogether different from what it really is. Then, under the rule laid down by Serjeant Williams, a rule which is almost always cited and approved whenever

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the subject comes before the courts, we think the plaintiff is not entitled to recover upon the facts appearing in this case. The principal difficulty presented by the question involved in the case at bar grows out of conflicting decisions in the state of New York. *Chase v. Hinman*, 8 Wend. 452, cited by appellant, is perhaps the strongest case in support of his position. It is there distinctly decided that "if the indemnity be not only against *actual damage* or expense, but also against *any liability* for damages or expenses, then the party need not wait until he has actually paid such damages, but his right of action is complete when he becomes liable for them." This decision seems to have been based, in a great degree, upon *Rockfeller v. Donnelly*, 8 Cow. 639, which is, however, admitted by the author of the opinion in *Chase v. Hinman* to go too far, and of which Justice BRONSON in *Aberdeen v. Blackmer*, 6 Hill, 326, remarks, that it is, "to say the least of it, a very questionable case." See also *Webb v. Pond*, 19 Wend. 423. And Mr. Sedgwick, in his work on damages (pp. 309-314), shows conclusively, as we think, that the rule laid down and followed in *Rockfeller v. Donnelly* is neither good law nor good sense. The case of *Chase v. Hinman* was followed by *Churchill & Hays v. Hunt*, 3 Den. 321, in which the opinion was delivered by Justice BEARDSLEY (Justices BRONSON and JEWETT concurring with him). Justice BEARDSLEY says: "This bond is a common-law obligation, and the part of the condition now in question is but an engagement to indemnify the plaintiffs against their liability as makers of the note. Notwithstanding what is said in the case of *Chase v. Hinman*, 8 Wend. 452, I must say that I am not aware of any distinction, at common law, between an indemnity against damage and one against liability, which warrants a recovery on the latter on simply showing the fact of liability. In both, as I think, there must be evidence of actual damage, by the payment of money or otherwise." *Gilbert v. Wiman*, 1 Com. 550, when carefully examined, will not be found to affirm the doctrine above referred to as enunciated in *Chase v. Hinman*, if the sound rule be applied that the authority of a decided case is only co-extensive with the facts appearing in it. In this condition of the New York authorities, we have no hesitation in following *Churchill v. Hunt*, as furnishing what seems to us to be the most sensible rule, that, upon an agreement to *indemnify*, actual compensation should only be allowed for actual loss. *Warwick v. Richardson*, 10 Mees. & Wels. 284, cited by appellant, is squarely contradicted by *Aberdeen*

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v. *Blackmer*, 6 Hill, 325. See also *Leber v. Kanffelt*, 5 Watts & Serg. 442. *Pope v. Hays*, 19 Tex. 375, is based upon and follows *Chase v. Hinman*, while *Irving v. Reilly*, 34 Mo. 113, appears to follow *Churchill v. Hunt*. See also *Jeffers v. Johnson*, 1 Zab. 73. We also understand that our view of the question considered is sustained in 3 Parsons' Contracts, 186, 187, and by the reasoning in Sedgwick on Damages, 303-314, where the authorities are reviewed at considerable length. If we are right, the court below erred in refusing to charge the jury, at defendant's request, "that the plaintiff had proved no damage, and that they must find for defendant," and a new trial was properly granted. In this view of the matter it is unnecessary for us to consider the other points argued.

Order granting a new trial affirmed.

Affirmed.

 CONNOLLY V. DAVIDSON, appellant.

(15 Minn. 519.)

Negligence — Partnership — Negligence of co-servant — Liability of Master.

The plaintiff, a deck hand on the steamboat A., was injured by the explosion of the boiler of the steamboat R., while the boats were near each other. The defendant was owner of the steamboat A., but had an agreement with the owner of the steamboat R. that each should employ the men and manage his own boat, and at the end of the season the profits of the boats should be divided between them. In an action to recover damages for such injury, *held*,

1. That the defendant and the owners of the R. were partners, and each responsible for the negligence of the officers and crew of each boat.
2. That the plaintiff and the crew of the R. were not fellow-servants within the rule exempting the master from liability for injuries sustained by a fellow-servant.

THIS was an action brought to recover damages for personal injuries sustained by the plaintiff, by reason of the explosion of the steamer "John Rumsey."

On the 4th of November, 1864, the plaintiff was employed as a deck hand on the steamboat "Albany," and while on board said boat and near the steamboat "John Rumsey," was personally injured by the explosion of the boiler of the latter. The evidence tended

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to show that the explosion was the result of the negligence or misconduct of those engaged in running the "John Rumsey," and that the engineer having charge of the engine was not at the time duly licensed under the laws of the United States. Evidence was also introduced to show that the defendant was a partner with the owner of the "Rumsey" in the running of the boat. The deposition of H. T. Rumsey, owner of the "Rumsey," was introduced, which alleged, that at the time of the explosion, the steamer "John Rumsey" was owned by him and the defendant Davidson; that Davidson's interest was one-half interest in the boat, and one-half her earnings; that both had the management of the boat; and that they accounted together for her earnings. Other evidence of like effect was also introduced.

The defendant introduced evidence tending to show that the "John Rumsey" was, at the time of the explosion, properly enrolled under the laws of the United States; that her boiler was duly inspected and certified in 1864; that the engineer was skillful and competent, and that the explosion was the result neither of any defect in her machinery, nor of negligence on the part of her officers and crew; and, further, that Harvey T. Rumsey was, at the time, sole owner of the "John Rumsey," and had the exclusive control and management of her. Defendant, in his own behalf, testified, in addition to the above, that he had an arrangement with Harvey T. Rumsey, by which it was agreed that the earnings, during the summer, of the "Albany" and the "John Rumsey," among other boats, were to be divided in the fall, and that by such arrangement "each should have the exclusive control and management of his own boats and business, without any right on the part of the other to interfere with the same in any way," etc.

The court, at the request of the plaintiff, charged the jury as follows:

I. "If the boiler of the 'John Rumsey' exploded through the fault of the officers of the boat, as alleged in the complaint, and injured the plaintiff without his fault, and the defendants Davidson and Rumsey were at the time jointly interested in the navigation of the boat, as owners of her earnings and profits, they are both and each equally responsible to the plaintiff for the acts of the officers of the boat in causing the explosion; and it is immaterial, as regards such liability, whether or not the boat itself was the sole property of one of them, and controlled, and the officers and men employed,

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by one of them. If the boat was navigated for their joint benefit and profit, the acts of one in employing the officers and men and managing the boat were the acts of both, so far as third persons were concerned."

II. "If Rumsey owned the 'John Rumsey,' and Davidson owned the 'Chippewa Falls' and other boats, and it was agreed between them that each should employ the men and manage his own boats, and at the end of the season the profits of the boats were to be divided between them, that made them partners in running the boats, and each responsible for the carelessness and negligence of the officers and men of each boat."

III. "If Davidson was equally interested with Rumsey in the earnings and profits of the 'John Rumsey,' that made them partners in running the boat, and equally responsible for the carelessness and negligence of the officers and men on the boat, and it is immaterial which of them employed the men and managed the business of the boat."

IV. "If the boiler of the 'John Rumsey' exploded and injured the plaintiff without any fault on his part, and the defendants Davidson and Rumsey were interested at the time in the navigation of the boat as joint owners of her earnings and profits, the fact of such explosion is of itself full and sufficient evidence that it was caused by the fault or negligence of the defendants, or those in their employment, and entitled the plaintiff to recover, unless the defendants showed that no negligence or fault was committed by them or those in their employment."

The defendant Davidson requested the court to charge the jury as follows, which request was refused:

I. "The master is not liable to one of his servants for injuries sustained by him through the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business, unless the injury results from the incompetency of such fellow-servant, and such fellow-servant was employed by such master."

II. "The mere fact of the defendant Davidson having an interest in the earnings of the boat at the end of the season would not make him liable for any injuries sustained by reason of its explosion, if he had not such an interest in it so as to control or take part in the hire of servants or in discharging them, by whom the negligence, if any, occurred."

III. "A mere prospective interest in the earnings of the steam-

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boat 'John Rumsey,' to attach and be ascertained at the end of the season or time during which such earnings accrued and were made, and without any ownership or estate in said boats, and without any control of or participation in the management thereof, does not make defendant Davidson a copartner with the owner of said steamboat in the business thereof, nor make him liable for the acts and omissions of the servants, officers or employees of or on said boat."

IV. "The provisions of section 13 of the act of congress entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or part by steam,' approved July 7, 1838, do not apply as a rule of evidence, except in cases of suits brought by passengers."

The court charged the jury, "that, under the provisions of said section 13 of said act of congress, the fact of the explosion of the boiler of the 'John Rumsey' was full *prima facie* evidence of negligence;" to which charge the defendant duly excepted.

Allis, Gilfillan & Williams, for appellant.

Smith & Gilman, for respondent.

RIPLEY, C. J. On the 4th November, 1864, the plaintiff was employed as a deck hand on board the steamboat "Albany," on which day said boat and the steamboat "John Rumsey" were navigating the Mississippi river, and when near St. Paul, and near each other, the boiler of the "John Rumsey" exploded, by which personal injuries were occasioned to the plaintiff, to recover damages for which this action was brought, in which, at the May term, 1868, of the district court of Ramsey county, the jury returned a verdict for plaintiff, and against defendant Davidson. The case comes up upon exceptions to instructions given by the court to the jury, and to its refusal to give certain instructions prayed for by defendant Davidson.

The explosion is that out of which the actions of *McMahon v. Davidson*, 12 Minn. 357, and *Fay v. Davidson*, 13 id. 528, arose.

In the former, plaintiff was a deck hand on the "Rumsey," in the latter, a passenger on the "Albany." We are unable to see how the fact that plaintiff was a deck hand on the "Albany" makes any difference in principle. Those decisions, therefore, sustain the instructions given, and the refusal to give the instruction asked by defendant as to the effect of the explosion as evidence of negligence,

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and the application of the act of congress, as the same are set out in the bill of exceptions. The second and third instructions asked by the defendant and refused are identical respectively with the second and fifth asked for by him in *Fay v. Davidson*, and held in that case to have been properly refused; the latter as abstract and inapplicable to the case, because the interest of Davidson, whatever it was, was not an interest attaching at the end of the season; the former, because he might have an interest which would have made him responsible for the negligence of the employees on the "John Rumsey," although it did not give him a right to control or take part in the hire and discharge of such servants. These reasons are equally applicable to the present case. It follows that the second and third instructions asked were properly refused; and, also, that such refusal does not, as the defendant contends, assume, in substance, that the agreement testified to by Davidson made him a partner with Rumsey.

The defendant objects further, that the charge is to the effect, that any interest, without regard to its character, in the earnings and profits of Rumsey's boats would make Davidson a partner with Rumsey, and the second and third instructions, given at plaintiff's request, are specified as those obnoxious to this objection; but they are not, in our judgment.

As to the second instruction, the division there contemplated must, we think, be understood as a division of the profits, as such, of the boats. The word "profits" must be taken, as it is to be presumed that it would be taken by the jury, to mean the excess of receipts over expenditures, that is, net earnings; such being its usual, ordinary and correct meaning. A stipulation for a share of the net gains is a stipulation for a share of profits, as such. Story on Part. 51; *Doe v. Halsey*, 16 Johns. 34, 40. This instruction does not assume, then, that any interest, without regard to its character, in the earnings and profits of Rumsey's boats, would make Davidson a partner with Rumsey. Nor does the third; that does not necessarily imply that the boat was solely owned by Rumsey; but if it did, yet if Davidson were equally interested with Rumsey in her earnings and profits, there must have been a joint ownership in the profits; for, if Rumsey were sole owner of the boat, his interest in the profits would be that of owner, and so must Davidson's be, otherwise he would not, as to them, be in that particular upon an *equality* with Rumsey. *Equally* interested imports equality in *all respects*.

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It will not be denied that an agreement for a share of profits, as such, would vest a present interest or ownership in them as they accrue and before they are divided.

The time at which the division is to take place is immaterial. The second instruction, as well as the third, assumes, therefore, a joint ownership in the profits.

The defendant, however, objects further that said second instruction assumes that such a contract as Davidson testified to would have the effect to create the relation of partnership between himself and Rumsey.

The difference between his testimony as stated in *Fay v. Davidson* and in this bill of exceptions is obvious and we think material. If his evidence, as here stated, would tend to prove an agreement to divide profits, as distinguished from gross earnings, the defendant's proposition is correct, otherwise not. For it is not to be presumed that the court used, or the jury understood the word "profits" to be used, in any other than the correct and ordinary sense above indicated. Such an assumption as to the jury would be inconsistent with that intelligence which the theory of trial by jury presupposes. *Raymond v. Nye*, 5 Met. 151. We are not prepared to say, however, that his evidence does *not* tend to prove an agreement to divide profits as distinguished from gross earnings. The agreement was, that at the end of the season of navigation for that year they should divide, in certain proportions agreed upon, the earnings of certain specified boats, including the earnings of the "John Rumsey" and "Albany," the earnings of the said "John Rumsey" and "Chippewa Falls" to be equally divided, and that at the end of such season each should render an account of the earnings of his boats during such season to the other, and then the balance, according to the proportions agreed on, should be paid over.

Neither the principles which regulated the division nor the proportions in which the earnings of the other boats were to be divided are stated, but it is quite conceivable, nay, fairly to be inferred, that the probable cost of running each boat was taken into the account in settling the proportion of earnings with which it was to be credited, and that the cost of running the "Chippewa Falls" and "John Rumsey," may have been assumed as equal. An equal division of their earnings would otherwise be apparently inequitable, in the absence, that is to say, of any information respecting the two boats other than that furnished by the bill of exceptions, and we cannot

presume that the parties made any arrangement which would not look to an equitable division of the results of the business. If the parties assumed that the expenses of running each boat would be the same, then the agreement to divide the earnings equally would be an agreement to divide profits.

Suppose, however, that Davidson's testimony has no tendency to prove an agreement to divide profits? There would then apparently be no evidence in the case, so far as the bill of exceptions discloses it, tending to prove the state of facts assumed by the second instruction; still the jury might, upon the evidence stated, have believed that Davidson and Rumsey jointly owned and managed the "John Rumsey" and found a verdict for plaintiff on that ground. It cannot, therefore, be said that the *result* shows that the jury were misled by the generality of the charge to believe that it referred to Davidson's evidence; if not, and it was correct in point of law, the judgment will not be reversed because there was no evidence to warrant the charge. 3 Gra. & W. 828. Defendant might have asked for more specific instructions if he feared any misapprehension on the part of the jury. Indeed, this being a bill of exceptions not purporting to give the charge in full, we cannot presume that instructions sufficiently specific to prevent the jury from confounding the agreement sworn to by Davidson with that assumed in the charge were not given. Where the case comes up on such a bill of exceptions, the presumption is that the charge, where not set out, was full and correct on all material points.

The question remains, whether this second instruction is correct in point of law.

In the first place, if a partnership existed between Davidson and Rumsey in the business of running the boats, as stated in the bill of exceptions, Davidson was liable in tort for the negligence of a servant exclusively employed and paid by Rumsey, by which a third person should be injured while such servant was engaged in said business. *Coltner v. Beltner*, 1 Bro. 490; *Champion v. Bostwick*, 18 Wend. 175. The liability of one partner for the acts of his co-partner is but the liability of a principal for the acts of his agent. Storey on Part. § 1. In the next place, it is not necessary that such partnership should have been intended or actually exist. It is sufficient if the facts are such that the relation exists as between the parties and third persons, whatever may have been the intentions of the parties in that behalf. *Champion v. Bostwick and wife*, 18

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Wend. 175. The defendant says, however, that there was no connection in the business; each was to run his boats where he pleased and as he pleased.

In the case last above cited, which presents many points of analogy with this, the decisive feature was, that all the fare received from passengers by any of the parties was to be a common fund for division. Per COMSTOCK, J., in *Merrick v. Gordon*, 20 N. Y. 93.

So, here, all the receipts for passengers and freight on any part of the route of either boat constituted a common fund for division. And in *Smith v. Wright*, 1 Abb. Pr. 243, there was no more "mixing of management" than in this case; each of the firm alleged to be partners having the exclusive control and management of the business done by it under the agreement between them. These two mercantile firms mutually agreed each to put out contracts in its own name, for sale and delivery of produce at future days, all profits of such adventures and all losses to be equally divided.

The court of appeals, reversing the judgment of the supreme court (S. C., 5 Sanford, 113), held, that this agreement created the relation of partnership as to third persons, and that the one firm was liable as a partner upon a contract made by the other, accordingly, in its several name.

It is true, the court observe in that case, that a community of interest in the profits is all that has ever been considered necessary to create a partnership as against third persons; whereas the modern English rule is, that the test whether a person who is not an ostensible partner in a trade is, nevertheless, in contemplation of law, a partner, is not whether he is entitled to participate in the profits, although this affords cogent, often conclusive, evidence of it, but whether the trade has been carried on by persons acting in his behalf. *Smith v. Wright* would nevertheless fall within the English rule, for, if there was to be a community of interest in the profit and loss of each contract, the firm that made it was certainly acting on behalf of the other, as well as itself, in so doing.

Neither is the circumstance, if it be so, that by the agreement which the second instruction assumes each would bear his own losses, at all inconsistent with the existence of a partnership as to third persons.

In *Waugh v. Carver*, 2 H. Bl. 235, the leading case on this subject, there was an express stipulation, that neither of the alleged partners should be answerable for the acts or losses of the other. In

that case A. and B., ship agents at different ports, entered into an agreement to share in certain proportion the profits of their respective agencies, and they were held partners as to third persons, notwithstanding the above stipulation as to losses. Nor is it material "that the balance, according to the proportion agreed on, was to be paid over at the end of the season." See a similar agreement in substance in *Waugh v. Carver*. We might admit the English doctrine, as laid down in *Wheelcroft v. Hickman*, 99 E. C. L. 47, and yet the fact, that by the agreement which the second instruction assumes, the profits of the business were to be equally divided, would, we think, furnish conclusive evidence of the existence of a partnership as to third persons. Whatever should be earned by either under that agreement would be received on joint account, to be subsequently divided, which would make them partners as to third persons. 1 Smith Lea. Ca. pt. 2, 1191. In carrying on the business in which it was earned each would act for the other as well as for himself. "A man who orders another to carry on trade, whether in his own name or not, to buy and sell, and pay over all the profits to him, is undoubtedly the principal, and the person so employed is his agent. So, if two or more agree that they shall carry on a trade and share the profits of it, each is a principal, and each is an agent for the other, and each is bound by the other's contracts in carrying on the trade as much as a single principal would be by the act of an agent who was to give the whole of the profits to his employer. Hence it becomes a test of the liability of one for the contract of another, that he is to receive the whole or a part of the profits arising from that contract by virtue of the agreement made at the time of the employment. I believe this is the true principle of partnership liability." Per Lord WINSLEYDALE in *Cox v. Hickman*, 99 E. C. L. 47, 99.

We perceive nothing in the state of facts assumed by the instruction which would go to repel the presumption arising from the agreement to share profits, that in running his boat Rumsey was acting as well on behalf of Davidson as of himself. The instruction is, therefore, we think, correct in point of law.

The defendant further excepts to the instruction given, and to the refusal to give the first instruction prayed for by him, because, as he alleges, if there was a partnership, the "John Rumsey" and "Albany" were in it, and, as the jury must have found that plain-

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tiff's injuries were sustained through the negligence or misconduct of those employed in navigating the "John Rumsey," he must be considered as their co-employee, within the rule which exempts the master from liability to one of his servants for injuries sustained by him through the negligence, carelessness or misconduct of a fellow-servant employed in the same general business. If Davidson's testimony does not tend to prove the state of facts assumed by the second instruction, there is no evidence that the "Albany" was included in any arrangement under which he and Rumsey were partners in running the "Rumsey." If it does, however, the case on this bill of exceptions does not fall within the rule referred to. Plaintiff and those navigating the "John Rumsey" cannot be said either to be engaged in the same common enterprise, or employed to perform duties and services tending to accomplish the same general purposes, as that language is used in the case of *Wright v. Central R. R. Co.*, 25 Wis. 562 (relied on by defendant), as synonymous with "the same general business," nor are the examples there given of maintaining and operating a railroad, "operating a factory," "working a mine," or "erecting a building," at all analogous to the case at bar. If (and we think the test a good one, as illustrated by the case of *Abrahams v. Reynolds*, 5 Hurl. & Norm. 142) the question in each case is, as the court of appeals state that it is, whether the alleged co-employees are under the same general control, the rule clearly cannot be claimed by defendant to apply here, for he swears that he and Rumsey had each the exclusive control and management of his own boats and hands. Each boat, in fact, was doing a separate business in every respect (though of the same sort) as much so as any two independent railroads separately owned and managed, but run for the joint profit of the owners, in which easily conceivable case, while the owners of the railroads might be partners as to third persons in the business of running each, the employees on each, though they were engaged in the common enterprise of maintaining and operating *that* road on which they were respectively employed, and assume the risks incident to *that* business, could no more be said to assume the risks incident to the business of maintaining and operating the road upon which they are not employed, than in the instance put in the leading case on this subject, in this country, of *Farwell v. Boston and Wor. R. R.*, 4 Met. 49.

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There was no error, therefore, in the instruction in this respect, and the instruction asked and refused would, in our view of the case, be an abstract proposition, having no application to the facts of the case, and therefore properly refused.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE

GERRISH v. CLOUGH, appellant.

(48 N. H. 2.)

Littoral rights.

The defendant, owning land on one side of a river, built a break-water to prevent the water's encroaching upon his land, which had the effect to throw the current over upon and wash away the plaintiff's lands opposite. *Held*, that the defendant was liable.

ACTION on the case for diverting the current of the Merrimack river, by reason of which the plaintiff's lands were washed away.

The plaintiff and defendant respectively owned lands on the opposite sides of the river, and it appeared that for several years prior to 1861 the river had been encroaching on and washing away defendant's lands, while it gradually receded on the side owned by the plaintiff.

To prevent further encroachment, the defendant erected on his side of the stream a break-water, which, it was contended, had changed the current so as to throw it over against the plaintiff's lands, which were in consequence washed away. The court instructed the jury that the defendant had the right to protect his banks from further encroachments, provided it did not work injury to other riparian owners, but had no right to turn the current so as to wash away plaintiff's lands, and that if the channel of the river was gradually changed by natural causes, the channel as so changed must be regarded as the rightful channel as respects the rights of the opposite owners. The jury rendered a verdict for the plaintiff, and the defendant moved for a new trial.

J. H. George, for plaintiff.

Pike, for defendant.

SARGENT, J. It is very well settled that land formed on one side of a stream of water by the variations in the channel, caused by the natural flowing of the water therein, belongs to the owner of the land on that side of the stream. These natural accretions are entitled to the same protection, when once acquired, that the original inclosure would have been. Either party may protect himself against any anticipated change of that kind by rubbing or securing his bank in any way that shall keep the channel in its present location, if he do not thereby injure or raise the water upon his neighbor's land, either above or opposite to him. *Scrutton v. Brown*, 4 B. & C. 485; *Rex v. Lord Yarborough*, 3 id. 91; *Adams v. Frothingham*, 3 Mass. 352; *Rex v. Trafford*, 1 B. & Ad. 874; *Jones v. Soulard*, 24 How. (U. S.) 41; *Rix v. Johnson*, 5 N. H. 520.

It is claimed that the doctrine of reasonable use should come in here, in the use of measures for self-protection, and the case of *Bassett v. Salisbury Man. Co.*, 43 N. H. 569, 577, is cited as an authority. But that case evidently does not apply here. The reasonable use doctrine of that case was applied to percolation where there was no water-course, and that case has no bearing on this case. The jury were instructed in that case (p. 571) that, if there was a water-course on plaintiff's land, the defendants could not raise the natural level of the water in the water-course on plaintiff's lot; and so was the decision in *Amoskeag Co. v. Goodale*, 46 N. H. 53.

The doctrine of the right of reasonable use is applied to water-courses in a class of cases, as in *Hayes v. Waldron*, 44 N. H. 580; but, in those cases, the question arises between one riparian owner who uses the water of the stream as it passes through his land for some particular purpose, and the riparian owners *below* him on the same stream. This distinction is noted in *Bassett v. Salisbury Co.*, 43 N. H. 578, where it is said that the views in relation to the right of reasonable use, as above noticed, are not necessarily in conflict with the cases which hold that a riparian proprietor *below* has in general no right to raise the water of a stream above its natural level on land of a riparian proprietor *above*.

This doctrine of reasonable use, as applied to water-courses, is

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applied, so far as we know, only to a use of the water in some ordinary and common sense. But in this case defendant made no use of the water on his land, but was simply trying to prevent the water from destroying his land. Suppose the defendant owned the plaintiff's land, and (owning on both banks) he should build a dam across the river to prevent the river's washing away his bank, and should thereby flow a piece of plaintiff's land up the river, he would clearly be liable, according to *Amoskeag Co. v. Goodale* and all the authorities. It could make no difference whether he built the dam to protect his land or saw logs.

Whatever his object, he would have no right to raise the level of the river on plaintiff's land up stream. The doctrine of reasonable use does not apply to a dam raising the height of the water above the dam. Now the plaintiff's break-water was a dam, or in the nature of a dam. It makes no difference that it did not extend across the river. Many dams made for use extend only part way across the stream. It is immaterial whether the dam be long or short, whether it be a break-water or any other obstruction. Its form, character and extent are of no account if it raises the height of the river on land of others above the obstruction. Suppose, in clearing his land of stones, the plaintiff dumps them into the river to get rid of them, thereby filling up and obstructing the channel of the river, and thus raises the water on land of others, he would be liable, and there would be no question of reasonable use, nor would it make any difference whether the land flowed were ten rods above the obstruction, or ten feet, or one foot; nor would there be any difference in principle whether defendant owned the land on both sides of the stream at the place of the obstruction, and the plaintiff's land that was flowed was ten rods above, or whether defendant owned but one bank of the stream and the plaintiff owned the other bank opposite, which was flowed in consequence of such obstruction.

The general rule would seem to be that whether a riparian owner uses the river or not, he cannot, either in the use of the water or in the pursuit of any other object, raise the height of the water in the river on land of others above his obstruction. The instructions to the jury were substantially to that effect. "To turn the current of the river so as to throw it over on to the plaintiff's land," is merely to raise the height of the water above its natural level on the plaintiff's land, by defendant's break-water operating as a dam or an obstruction.

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It would seem that a different rule had sometimes been applied where the lands border upon the sea or ocean. In *Rex v. Pegham*, 8 B. & C. 355, it was held that all owners of lands exposed to the inroads of the sea might properly erect such works as are necessary to protect their lands, although such works may cause the sea to flow with more force upon the land of another than it would have done without such protection.

But the distinction between that case and the case of ordinary water-courses, is recognized in England, as will be seen by the remarks of Lord TENTERDEN, C. J., in *Rex v. Trafford*, *supra*. He says: "It is a well-known fact that the sea occasionally, by some change proceeding from natural and unknown causes, makes gradual inroads on parts of a coast which had been free from its waters for centuries. On such occurrences it has been compared, and justly compared, to a common enemy, against which every person may defend himself as he can; but this is perfectly different from an occasional course of superabundant inland water," etc.

In regard to ordinary water-courses, it seems well settled that a riparian proprietor, for his own protection or convenience, has no right to build any thing which in times of ordinary flood will throw the water on the grounds of another proprietor so as to overflow and injure them. One may protect his own property; but "though the river threatens to change its channel and to encroach upon your land, you cannot protect yourself to the prejudice of the opposite proprietor." Angell on Water-courses, §§ 330-334, and cases cited.

We think the instructions were correct, and there must be

Judgment on the verdict.

GOVE V. THE FARMERS' MUTUAL FIRE INSURANCE COMPANY.

(48 N. H. 41.)

Insurance — Fire set by insane person.

The plaintiff's buildings, which were insured, were intentionally set on fire by his wife, who was insane, and who had been left alone by the plaintiff. It appeared that she had frequently been left alone before this occasion. In an action on the policy of insurance, *held*, that the plaintiff, in leaving his wife alone, had not been guilty of such a degree of negligence as would constitute a defense for the defendants.

Gove v. The Farmers' Mutual Fire Insurance Company.

THIS was an action on a policy of insurance issued by the defendants.

The following facts were agreed upon:

The property insured was destroyed by fire on the 19th day of March, 1867. The plaintiff was the owner of two undivided third parts of the same. The buildings were intentionally set on fire by the wife of the plaintiff, who was insane at the time, and is now in the asylum at Concord. She had not been in the asylum before the fire, and had frequently been left alone two or three hours at a time before this day. She was left alone on the day of the fire, and at the time it happened.

Morrison & Stanley, for plaintiff.

Eastman & Cross, for defendants.

NESMITH, J. The doctrine now appears to be well settled by the authorities, that a loss by fire on land, occasioned by the mere fault and negligence of the insured party, his servants or agents, without fraud or design, is a loss protected by the policies, and as such recoverable from the underwriters. Judge STORY, in *Waters v. The Merchants' Louisville Ins. Co.*, 11 Pet. 213; *Sherwood v. General Mutual Ins. Co.*, 14 How. 351; 3 Kent's Com. 374, and notes; *Ruck v. Royal Exchange Co.*; Angell on Ins. §§ 124, 125, and 122; 2 Barn. & Ald. 73; *Dixon v. Sadler*, 5 M. & W. 405; 8 id. 894; *Shaw v. Roberts*, 6 A. & E. 75.

Generally, *negligence* is not *design*. *Catlin v. The Springfield Fire Ins. Co.*, 1 Sum. 434. The court in the state of New York, say that before this ground of defense can be made available, there must be evidence of such a degree of negligence as will evince a corrupt design. *Hyndes v. Schenectady County Mut. Ins. Co.*, 16 Barb. 119.

There are cases of gross neglect which are, in law, deemed equivalent to a fraudulent purpose or design, founded on the consideration of doing nothing, when the slightest care on the part of the insured would prevent a great injury. Judge SHAW supposes the case where the insured, in his own house, sees the burning coals in the fire-place roll down on his wooden floor, and does not brush them up. This would be nonfeasance, and evidence of a culpable recklessness and indifference to the rights of others. He also supposes the insured premises to take fire, and the flames beginning to

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kindle in a small spot, which a cup of water might put out, and the insured has the water at hand but neglects to put it out. This, also, would be culpable negligence, manifesting a willingness differing little in character from a fraudulent and criminal purpose to commit injury to others. *Chandler v. Worcester Mut. Fire Ins. Co.*, 3 Cash. 328; 31 Me. 219; *Huckins v. Insurance Co.*, 31 N. H. 238; Angell on Ins. § 130.

It would be fair to infer a fraudulent intent in the insured, as would be indicated in a forbearance to use all reasonable exertions to save his property from the ravages of fire, when ample preventative means and ability are at hand. Evidence of this kind of negligence will tend to discharge underwriters and insurers from their liability in case of loss.

There are some cases where it has been held that the insured is entitled to indemnity, though the loss occur from the gross carelessness of his servant, the proximate cause being only looked to, and fraud being absent. *Gates v. Madison County Mut. Fire Ins. Co.*, 1 Seld. 469; approved and followed in *Matthews v. Howard Ins. Co.*, 1 Kern. 9; 1 Duer, 371.

From the aforesaid cases we may derive a knowledge of some of the leading principles applicable to questions of indemnity by fire insurance companies, where negligence is imputed to the insured, his agents or servants. One remaining duty is to inquire how far any of the aforesaid rules will govern the case before us. The defense suggested by the defendants is, that the plaintiff, the husband of his insane wife, and part owner of the property, alleged to be insured by the defendants, left his wife alone on the day of the fire for some time, it does not appear how long, and that she *intentionally* set her husband's buildings on fire. The case finds the wife was insane at the time of committing the act. It appears to us, it would be a misnomer of terms that she, being admitted to be in this state, could so far control her reasoning powers as to be able to plan or design the act done by her beforehand, in such a manner as to render herself responsible as a moral agent. The word *insane* implies unsoundness or derangement of mind or intellect, not a mere temporary or slight delirium which might be occasioned by fever or accident; and we cannot attach moral accountability to a wrongful act admitted to be done by an *insane* person. Then, the question recurs, if the wife be admitted to be insane when the fire was set by her, was the husband guilty of negligence in leaving her

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alone? On this point, the case finds that she had frequently been left alone two or three hours at a time before this day. It does not appear that she had set fires or destroyed her own or other's property on these occasions when left alone; or that her husband or friends had any previous warning of any proclivity on her part to commit excesses of any kind by inflicting injury either upon person or property. The fact that when before left alone on other occasions, the wife had not committed any wrong or violence, furnished an argument in her favor as well as her husband. The husband cannot be held to any thing more than the exercise of ordinary care and prudence in his conduct toward his wife and others interested in her welfare. It is doubtless a safe general rule, as tested by experience, to commit the subjects of derangement to an asylum, or to skillful medical treatment, at an early stage of their disease; but, because this course is not adopted in every instance, we think the inference of gross negligence is not to be imputed to the friends of such patients as prefer to travel another path. The friends of the insane must be allowed some indulgence and discretion, if they prefer to watch over the incipient stages of the diseased subject at home, and to use their efforts to arrest the progress of the malady there. They may not have the pecuniary ability to support the unfortunate friend at an asylum, or away from home. Such considerations must weigh materially in cases of this kind, and will serve to rebut the presumption of the existence of that degree of negligence which is deemed equivalent to a fraudulent purpose or design in him who is the responsible keeper of insane persons. We cannot see in this case evidence of the existence either of design or of that degree of negligence or carelessness which will constitute a legal defense for the defendants.

Therefore, under the agreement of the parties, we think a judgment should be rendered for the plaintiff for the sum of \$1400, and interest from June 19, 1867.

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BROOKS v. COTTON.

(48 N. H. 50.)

Contract — Day's work under ten-hour law.

Under a statute providing that, in all contracts for or relating to labor, ten hours of actual labor shall be taken to be a day's work, unless otherwise agreed by the parties, the plaintiff worked for the defendant from November to April, each day from sunrise to sunset, under an agreement for \$2.50 a day, without any agreement as to how many hours should constitute a day's work. The plaintiff brought suit to recover \$2.50 for each actual day's work; the defendant claimed that he was entitled to \$2.50 for each ten hours' work only. *Held*, that it was for the jury to determine whether or not the work done by the plaintiff in a day was, by the understanding and implied agreement of the parties, to be taken as a day's work.

THIS was an action to recover for work and labor.

It was agreed that the plaintiff offers evidence tending to show that, being a house carpenter by trade, he agreed with the defendant to work for him in his trade as house carpenter for the sum of \$2.50 per day, nothing being said by either party as to the number of hours necessary to constitute a day's work, nor as to what should constitute such a day's work, and that he did work during said time one hundred and ten and a half different days, each day working from sunrise to sunset, but not ten hours per day for each of said days. The plaintiff claims to recover for each actual day's work the sum of \$2.50 per day. The defendant claims that a day's work is a day of ten hours, and it is agreed that in thus reckoning it the plaintiff has not worked one hundred and ten and a half days, but a less number. The parties agree to submit to the court the question as to what constitutes a day's work, and the case to be set down for trial or judgment on their finding.

Goodall, for plaintiff.

Hatch, for defendant.

PERLEY, C. J. We take the general statement of the case to be this: The plaintiff worked for the defendant at his trade of a carpenter from November to April, under an agreement for \$2.50 a day, without any previous express agreement fixing the number of hours he should work for a day; without any question made until

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the work was done as to what should constitute a day's work, and without any request that he should work longer for a day. We suppose that the defendant must have known, while the work was going on, how long the plaintiff worked for a day, and made no objection that he did not work daily as long as by his agreement and the understanding of the parties he was bound to work; that no account was kept of the time worked in each day. The ground taken by the defendant requires it to be now ascertained how many hours the plaintiff worked in all, and that he should receive \$2.50 for each ten hours of labor, which it may be found on evidence now introduced that he actually worked for the defendant.

The statute is in these terms: "In all contracts for or relating to labor ten hours of actual labor shall be taken to be a day's work unless otherwise agreed by the parties; and no person shall be required or holden to perform any more than ten hours' labor in any one day, except in pursuance of an express contract requiring a greater time."

It is to be observed, that where the employer insists on more than ten hours of work a day, the statute requires that the contract which he relies on should be *express*. In other cases, agreements varying from the statutory provision are not required to be express, and of course may be implied. If, in this case, the nature of the work done, the custom of the business, and the conduct of the parties while the work was going on, should show that the work done in a day was understood by them at the time to be a day's work, and was accepted as such by the defendant, an agreement would be implied that the work done in a day should be taken for a day's work. By accepting, from time to time, the work done in a day as a day's work, the defendant would be understood to have agreed and assented that the work so done in a day should be reckoned and paid for as a day's work, though less than ten hours. If the plaintiff was bound to work ten hours for a day's work, the defendant was bound to employ him for ten hours in each day. The plaintiff could not be required to devote more than one day to a day's work.

The employer cannot *require* the laborer to work more than ten hours in a day without an express agreement; that is to say, if the laborer is called on at the time to work more than ten hours in a day, he cannot be required to do it unless he is bound to do it by an express agreement. But we do not understand that this provision reaches to the case where the laborer, hired by the month or the

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year, has voluntarily worked more than ten hours a day. If he is to be paid at a certain rate per day, it may in such case be implied from the nature of the employment and the conduct of the parties that what he did in a day was to be reckoned as a day's work. There would be great inconvenience when labor had been performed according to the custom of the business without any question raised on the subject, and without any time actually kept, if, after the work was done and accepted, either party could insist on an inquiry whether more or less than ten hours a day had been worked on an average of the whole time. In the miscellaneous work done on a farm at different seasons of the year, it would be extremely inconvenient to insist on the application of the statutory rule of exactly ten hours' work in a day, and still more so in some other employments, like domestic service. Practically the statutory rule is not, we understand, followed in such cases; and it may be implied, where more or less work than ten hours a day is done and accepted without objection, that the parties have understood and agreed that the work actually done in a day shall be reckoned and taken for a day's work.

In this case, we think it must be left to the jury to find, as matter of fact, whether the work done by the plaintiff in a day was by the understanding and implied agreement of the parties to be taken and reckoned for a day's work.

Case discharged.

EAST KINGSTON V. TOWLE.

(48 N. H. 57.)

Constitutional law — Act compensating owners of sheep killed by dogs.

A statute provided that any person suffering loss by reason of the maiming, killing or worrying of his sheep by dogs, may present proof of the nature and extent of his damages to the selectmen of the town, who shall draw an order for the amount in his favor upon the treasurer of the town, and thereupon the town may recover of the owner of the dog the full amount of such order. *Held*, to be unconstitutional, in so far as it undertook to bind the owner of the dog by the decision of the selectmen fixing the amount of the damage without giving him an opportunity to be heard on the question. *Held*, further, that the town could nevertheless recover, under the statute, from the owner of the dog, the actual damage which the jury who try the

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cause find the owner of the sheep to have suffered, not exceeding the amount of the order drawn by the selectmen.

Evidence tending to prove that the dog had killed or worried sheep before is inadmissible in such action.

THIS was an action under the statute of 3d July, 1863, providing for compensating the owner of sheep injured by dogs. The case came up on demurrer which had been overruled in the court below. The plaintiff's sheep were killed by defendant's dog, as was alleged. The plaintiff offered to prove that the dog had killed sheep on other occasions. The other facts appear in the opinion.

Wood, for defendant.

Stickney, for plaintiff.

PERLEY, C. J. This action is brought by the town on the statute of 1863, which provides that "every person suffering loss or damage by reason of the maiming, worrying, or killing of his sheep, lambs, or other domestic animals by dogs, may, within thirty days after he knows of such loss or damage, present to the selectmen of the town, wherein such loss or damage happened, proof of the nature and extent thereof; and thereupon said officers shall draw an order in favor of the person suffering such loss or damage, upon the treasurer of said town, for the amount of the same." The statute requires that the orders so drawn shall be registered by the treasurer and paid at the end of the political year in full, or, *pro rata*, out of the proceeds of the tax on dogs.

By the statute, after such order has been drawn, the town may recover, in an action of assumpsit against the keeper or owner of any dog concerned in doing the damage or occasioning the loss, the full amount of such order. The act does not make any provision for a written statement of the claim presented to the selectmen, nor for any description of the animals killed or injured, or of the nature of the injury. Nothing like process, record, or written account of what is claimed or decided is required, except the order, and the registry of it by the treasurer. The owner or keeper of any dog concerned in the damage done is made liable for the amount of the order, without any opportunity to be heard on the question of the amount, and from this adjudication of the selectmen he has no appeal. The *ex parte* determination of the selectmen without process, notice, or record, on such proof as they may choose to

receive, is by the act made conclusive on the owner or keeper of the dog as to the amount of the damage done, and, consequently, as to the extent of his liability.

The party suffering the damage has his election to take the order, or sue the owner or keeper of the dog for the penalty given by the first section of the act; but, having sued or taken the order, he is bound by his election and cannot have the other remedy. The amount of the order drawn by the selectmen is limited to their estimate of the actual damage done to the animals; and the amount thus fixed by the selectmen is the compensation to the owner of the animals if he takes the order, and he has no other remedy; and this by the statute is substituted for the ordinary remedy by action in the name of the party who has suffered the injury. The owner of the dog is therefore directly interested as the real party in the inquiry before the selectmen, and in the terms of the act is bound by their determination. The amount of the order and the extent of the dog-owner's liability is not limited by any thing, except the finding of the selectmen as to the amount of the damage, which may be trifling or large; for the injury may be to any class or any number of domestic animals, and the owner or keeper of any dog is made liable for all the damage that may be done by the largest pack, if his dog made use of them. The amount of the order in this case is not stated, and is not material to the legal questions raised. It is not shown or alleged that, in this case, the defendant actually appeared before the selectmen and was heard on the question of damages, or that he had opportunity to appear or had any notice of the application.

Is this act, so far as it undertakes to make the owner of a dog absolutely liable for the amount of damage paid by the selectmen, without opportunity to be heard on the question, within the general scope of legislative authority delegated by the constitution to the general court?

The general court is the legislative department of the state government, and has, under the constitution, an ample grant of legislative power; the extent of the power is, however, limited, not only by the express prohibitions of the constitution, but by the nature itself of the power granted; and to be valid and binding the act of the legislature must be within the general scope of legislative authority. The power delegated by the constitution "to make and ordain all manner of reasonable and wholesome orders, laws," etc.,

confers no authority to make an order or law in plain violation of the fundamental principles of natural justice, though the act may not be prohibited by any express limitation in the constitution. For instance, I find nothing in the constitution which in terms prohibits the legislature from making a law to take private property for a public use without making provision for compensation to the owner; yet, because it is contrary to natural justice that property belonging to an individual should be taken from him by the public, or for the public, without paying him the value, to do this is beyond the scope of legislative authority; and an act that should undertake to do this would be unconstitutional and void. *Piscataqua Bridge v. Portsmouth Bridge*, 7 N. H. 35; *Mason's Argument in the case of Dartmouth College*, Farrar, 35, *et seq.*

In the opinion of the judges (4 N. H. 566), this constitutional limitation of the legislative authority is stated and explained as follows: "The power granted is a power to make all manner of laws and statutes which are wholesome and reasonable, and not repugnant to the constitution. It is in its nature a limited, restricted power. It is an old maxim of the common law, that when an act of parliament is against common right and reason, the common law will control it and adjudge it void; and one object of this provision in our constitution was to adopt and confirm that maxim of the common law. An act of the legislature in order to have the force of a statute must, therefore, be neither repugnant to reason nor to the constitution." In the application of this principle the judges, in that opinion, held that the legislature had no constitutional right to grant a tax upon lands in a particular unincorporated place for the purpose of making and repairing roads in such place, because, after paying taxes under the general law, it would be unreasonable and contrary to natural justice that the lands in a particular place should be burdened with another additional tax.

In England even, the legislative authority of parliament is practically, if not in theory, subject to this limitation, that no law shall be passed which is contrary to common right and natural justice. Lord Coke, in *Dr. Bonham's Case*, 8 Co. 1186, says: "It appears in our books that in many cases the common law will control acts of parliament and adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void." In his life of Coke, Lord Camp-

bell, with characteristic flippancy, calls this "a foolish opinion;" but the same doctrine is laid down in *Day v. Savadge*, Hob. 86, 87, where Hobart says: "Even an act of parliament made against natural equity, as to make a man judge in his own case, is void in itself, for *jura naturæ sunt immutabilia*, and they are *leges legum*." Whatever the theory may be in England, I take it to be quite clear, that, under the grant of authority to make and ordain all reasonable and wholesome orders and laws, the constitution of this state confers no power upon the general court to enact a law in conflict with natural equity and those elementary principles of justice which are everywhere recognized as fundamental in law and legislation.

The Bill of Rights in article 15, declares that "no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities or privileges, or put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or *the law of the land*." Similar provisions, borrowed in substance from *magna charta*, are found in the constitutions of other states, and have there been held to impose a limitation on the legislative power as well as on the other departments of the government. Thus, in *Jones v. Robbins*, 8 Gray 342, SHAW, C. J., speaking of the corresponding provision in the constitution of Massachusetts, says: "No man shall be arrested, imprisoned, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land. These terms, we think, in this connection cannot be used in their most bold and literal sense to mean the law of the land at the time of the trial; because the laws may be shaped and altered by the legislature from time to time; and such a provision, intended to prohibit the making of any law infringing the ancient rights of the subject, under such a construction, be wholly nugatory and void." The same view was taken of a like provision in the constitution of New York, in *Taylor v. Porter*, 4 Hill, 140, 145. In *Greene v. Briggs*, 1 Curt. C. C. 311, it was held that such a provision in the constitution of Rhode Island meant by "the law of the land" due process of law, in which is included the right to contest the change. CURTIS, J., says: "Certainly this does not mean any act which the assembly may choose to pass. If it did, the legislature could inflict the forfeiture of life, liberty or property without a trial." So in *Parsons v. Russell*, 11 Mich. 113, it was held that "the law of the land" within the meaning of the term as used in the constitution of Michigan, "is a law, which hears before it con-

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demns, which proceeds upon inquiry, and renders judgment after trial." "If deprived of liberty or property, it shall be by impartial, judicial authority, after a trial and judgment." Per MARTIN, C. J.

In this state it would seem to have been understood that the provision of the bill of rights which prohibits all acts affecting life, liberty or property, except "by the law of the land," was not intended to limit the legislative power, but only to require that the proceedings should be according to the law for the time being. *Mayo v. Wilton*, 1 N. H. 57; *Dart. College v. Woodman*, id. 130. But the same limitation on the legislature has been by our courts placed on the ground that the general grant of authority to make reasonable and wholesome laws confers no power to enact a law in violation of the fundamental maxims of justice and equity; and the interpretation given to the term "law of the land" in the constitutions of other states, when applied as a limitation upon legislative authority, amounts in substance to the same thing; for, as interpreted there, the term "law of the land" is understood to embody in legal meaning the fundamental rules and maxims of justice which prevailed in the law at the time when the constitutions were adopted. Either way, whether these elementary principles of justice and equity are supposed to be embraced in the term "law of the land," or implied in the general nature of legislative authority, they equally limit the legislative power.

It is a maxim of general jurisprudence, not confined to any code, but, so far as I am informed, recognized as fundamental in the law of every enlightened people, that no man's private rights shall be concluded by any judgment, decree or other adjudication, to which he was not so far a party that he had opportunity to be heard, and to adduce evidence on all points that affected his interests. Broom's *Maxims*, 735; 1 Greenl. Ev. § 522. Proceedings *in rem* are no exception to this elementary rule; for, in such proceedings, every party interested has the right to appear and be heard; and every owner of property is supposed to keep such oversight of it as to be duly informed of the proceedings by the notices which are required to be given. Any act passed in violation of this principle of natural justice would not be a "reasonable and wholesome law" under our constitution, nor within the general scope of legislative authority.

This general principle, it is obvious, will apply in full force to proceedings instituted to determine the amount that shall be paid for an injury to property, or for the value of property taken from

the owner. An inquiry of damages involves the interest of the party adjudged to pay them as much and as directly as an issue on the question whether he is liable to pay any damages at all. The law is so on authority as well as in the reason of the thing. The king by his royal prerogative might establish a new highway, or discontinue an old one; and in either case his writ *ad quod damnum* issued to inquire of and determine the damage to individuals from laying out or discontinuing the way. This was an *ex parte* proceeding; and, therefore, though done under the king's writ, the return of the writ fixing the amount of damage was not binding on the parties interested, but was traversable; or the party might be heard on the question of damages before the chancellor, to whom the writ was returned. 2 Viner's Ab. 126, title *Ad Quod Damnum*, 2 Burn's J. 352.

In this state we have several cases, in which the necessity, under the constitution, of notice and opportunity to be heard on a question of damages in order to make the assessment binding, has been recognized. By the Revised Statutes, chap. 59, sec. 5, "if any person shall place in any highway or street, any timber, lumber, stones, or any thing whatsoever to the incumbrance or obstruction thereof, he shall be liable to the town for all damages which said town shall be compelled to pay to any person who has sustained damage by reason of such incumbrance or obstruction." The statute makes no mention of notice to the party who is to be charged with the damages which the town has been compelled to pay. If the town made a full, strenuous and skillful defense to the action of the individual who sued for damage caused by the incumbrance, the town would be compelled to pay the damages awarded against them in that suit. Still, though the town were compelled to pay the damages, as expressed by the statute, the judgment against the town would not be evidence against the defendant who was sued by the town under the statute to recover the amount they had been compelled to pay, of the party who placed the incumbrance in the highway, unless he had notice of the suit against the town and opportunity to come in and defend. *Littleton v. Richardson*, 34 N. H. 179. In *Webster v. Alton*, 29 id. 369, one question was, whether a town, sought to be charged with part of the expense of a highway laid out in an adjoining town, should have notice of the hearing on the original application for laying out the road. It was held that notice of the hearing on the matter of damages was sufficient; but the whole case goes on

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the concession that the town could not be charged with damages without notice of the hearing, and an opportunity to be heard on that question. The disposition of that case depended "upon the construction and constitutionality of the first section of the act of July 8, 1850;" and it would seem to have been admitted on all hands that the act would not have been valid if it had not provided for proper notice of the hearing on the question of damages. If the defendant in the present case had received notice of the application to the selectmen and had an opportunity to be heard before them, he might be bound by their determination, as was held in *Littleton v. Richardson*; but nothing of that kind appears in this case.

In this case the owner of the animals injured took the order on the treasurer as his remedy for the loss he had sustained. The amount was paid by an estimate of the actual damage done, and was received as the compensation for it. The recovery by the town, instead of the party who suffered the injury, does not change the nature of the payment, when made by the defendant. His interest in the question of damages is the same whether he pays the amount to the owner of the animals or to the town; and if the payment is called a forfeiture or penalty, or the statute a police regulation, still the interest of the defendant in the amount is the same, and his right to be heard on the question cannot be evaded by the name given to the payment or to the law.

We are of opinion that, so far as the statute undertakes to bind the defendant by the decision of the selectmen, fixing the amount of the damage, without giving him an opportunity to be heard on the question, it is not a valid law, because it is in violation of an elementary principle of law and justice, to wit: that a party is not to be bound by a judgment or other determination to which he was a stranger; that it is not a wholesome and reasonable law within the meaning of the constitution, which grants and defines the legislative authority, nor within the general scope of legislative power, because it is contrary to reason and natural justice.

Has the owner of the dog the right, under the constitution, that the question of damages should be tried by a jury?

"In all controversies concerning property, and in all suits between two or more persons, except in cases where it has been otherwise heretofore used and practiced, the parties have a right to trial by jury." Bill of Rights, art. 20.

Provisions in the constitutions of some of the states, intended to

secure the right of trial by jury, expressed in terms corresponding more or less nearly with this in our bill of rights, have been held to apply only to cases where an issue is joined and some right tried, and not to a mere inquiry of damages, in which the title to the property damaged or taken is not involved. In this state I understand that an inquiry of damages has been regarded as falling within the provision which guarantees the right of trial in all controversies relating to property, unless a different usage prevailed before the constitution was adopted in the class of cases to which the particular case under consideration belonged. *Backus v. Lebanon*, 11 N. H. 19; *Dalton v. North Hampton*, 19 id. 361; *Petition of Mt. Washington Road Co.*, 35 id. 134. Even if this provision in our bill of rights should be narrowed in construction, as similar provisions have been in some other jurisdictions, it would not relieve this case from the constitutional objection, for the cases to which that construction has been applied are where the sole question is as to the amount of compensation which the owner of property shall receive for it, or for some right in it, and not where an issue is tried on the fact whether the property has been injured or wrongfully taken, and the question of damages is an incident to the finding of the issue for the plaintiff; for what is really, and in substance, proposed to be done by this statute?

The owner of the animals is the real party injured; the owner of the dog is the party liable for the injury. The amount to be recovered in the suit by the town is the actual damage as determined by the selectmen, and that amount is the compensation to the owner of the animals for his damages. It is his remedy for the injury he has suffered, and, having taken the order, he has no other remedy. The statute assigns the right of action to the town, and the owner of the dog answers to the town, instead of answering directly to the owner of the animals in an action brought in his own name. The result, so far as the owner of the dog is concerned, is the same as if the suit were brought directly by the owner of the animals to recover damages for the injury he has sustained. The question, whether the defendant's dog was concerned in doing the damage, is tried by the jury; but if they find for the plaintiff, instead of the jury's assessing the damages as incident to the verdict, and as part of the verdict, the defendant is by this act made conclusively liable for the amount as determined by the selectmen. One tribunal tries the question of the defendant's liability for the damage, and another

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tribunal fixes in advance the amount of the damage, in case the issue as to his liability is found against him. In a trial by jury for an injury to person or property, the assessment of the plaintiff's damages is as much a part of the verdict for him as the finding of the issue; and a trial which should refer the assessment of the damages for the plaintiff to another tribunal would not be a trial by jury, according to the course of the common law, nor the trial secured to every subject by the bill of rights.

The damage for killing, maiming and worrying sheep and other domestic animals is uncertain and unliquidated, as much as in an action for an assault and battery. If the question of liability for the damage could be tried by the jury, and the inquiry as to the amount of the damage withdrawn from the jury, for aught that I can see, the same thing might be done by the same machinery in a case of assault and battery. Suppose this act had provided that when any person should be assaulted and beaten within the limits of any town, he might present his claim for the damages to the selectmen, and, on their drawing an order for the amount fixed by them, the town might recover the same amount of the party who was guilty of the assault and battery, in an action of assumpsit, the right of the defendant in that case to have the jury assess the damages, as part of the trial, would stand, under the constitution, exactly as it does under the statute of 1863. And by a like contrivance in all cases of injury to property, as in trespass to land, trespass for taking and carrying away goods, an essential and often the most important part of the trial by jury might be assigned to another tribunal.

The trial by jury, secured to the subject by the constitution, is a trial according to the course of the common law, and the same in substance as that which was in use when the constitution was framed. *Opinion of the Judges*, 41 N. H. 551. In all actions for injury to property the trial by jury included the assessment of the plaintiff's damages when the verdict was for him. This we regard as an essential part of the trial by jury intended to be secured by the constitution. By this act the defendant is deprived of the right to such a trial, and, so far as the act undertakes to make the defendant liable for the amount of damage fixed by the selectmen, we think it is in violation of the constitution, which secures the right of trial by jury "in all controversies concerning property."

It is said that the amount which, by the statute, the owner of the

dogs pays in the action by the town is in the nature of a penalty or forfeiture. There are cases where a penal action may be maintained to recover the amount, or double the amount, which an individual has suffered by a violation of his private rights; but in such cases the party subject to the penalty is as much interested in the assessment of the damages, and has the same right to a hearing on the question of damages, and to the same mode of trial, as where he is sued in a civil action sounding in damages, and the amount of the damages is determined by the jury who try the general question of the defendant's liability for the penalty. Com. Dig. Pl. 2, § 14; *Wybord v. Tuck*, 1 Bos. & Pull. 458; 3 Burn's Ec. Law, 534; 7 Went. Pl. 243. See also *Greene v. Briggs*, 1 Curt. C. C. 311. It would not relieve the act from constitutional objection if the suit by the town were held to be in the nature of a penal action.

So far as the act undertakes to charge the defendant with the amount of damage determined by the selectmen, we are of opinion that it is not a valid law, because it gives the owner of the dog no opportunity to be heard before the selectmen on that question, and therefore is not a wholesome and reasonable law within the general scope of legislative authority conferred by the constitution on the general court; and also because the act is so far in violation of the provision in the bill of rights, which secures the right of trial by jury in all controversies concerning property.

An act may be in part beyond legislative authority, and within it for the residue; and if the act is capable of being administered in the parts which are within the power of the legislature to enact, it will so far be valid. *Fisher v. McGirr*, 1 Gray, 1; *State v. Wheeler*, 25 Conn. 290; *Santo v. The State*, 2 Clarke (Iowa), 165. It would be in the power of the legislature to make towns liable for damage done by dogs, and to give the towns a right of action to recover the actual damage from the owners of the dogs, as is done in the case of obstructions placed on highways; and we think an action may be maintained on this statute by the town to recover from the owner of the dog the actual damage, which the jury who try the cause find the owner of the animals to have suffered, not exceeding the amount of the order drawn by the selectmen. If the declaration in this case relies on the order to establish the amount of damage, it may need amendment by inserting an averment that the actual damage was equal to the amount of the order drawn.

By the statute the owner of the dog is made liable for the damage

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done, whether the dog was accustomed to kill and worry sheep or not. We are not acquainted with any rule of evidence which will allow the character of the dog, or the fact that he had killed or worried sheep before, to be admitted as evidence that he did the damage complained of in this suit. To show that he did this mischief it is not competent to prove that he had done similar mischief before, more than it would be to prove that a defendant sued for an assault and battery had beaten other men before, or the same man.

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(48 N. H. 83.)

Reward for apprehension of criminals—Action on.

The selectmen of a town, under the authority of a general statute, offered a reward for the apprehension and conviction of a person guilty of the commission of a high crime. The plaintiff, claiming to have performed that service, brought action to recover the reward. *Held*, on demurrer, that the action was well brought. *Held*, also, that if two persons jointly performed the service they must be joined as plaintiffs.

THIS was an action of assumpsit brought to recover a sum of money promised in a "notice of reward," signed by the selectmen of the town, for the apprehension and conviction of the person or persons guilty of a burglary, described in the notice. A demurrer was sustained *pro forma*, and the court also *held*, that if any person beside the plaintiff had, actuated by said notice, assisted in performing the service, this action could not be sustained.

J. J. Bell, for plaintiff.

C. H. Bell, for defendant.

BELLOWS, J. The authority of the selectmen, in behalf of a town, to offer a reward for apprehending and securing any person charged with having committed any capital or other high crime, is expressly conferred by chapter 735 of the laws of 1848; and as no special remedy is provided by the statute the contract may be enforced by action in some appropriate form. It stands, for aught we can see, upon the same ground as an offer of a reward by a private person,

and there it is well settled that if, in consequence of such offer, the offender be apprehended and secured according to the terms of the offer, and within a reasonable time, the person doing it may, in an action of assumpsit, recover the reward.

This, put upon the ground that although such an offer is a mere proposal, or a conditional promise, and may be revoked at pleasure, yet if any one shall, before a revocation, perform the service, relying upon such offer, it becomes a legal and binding contract. *Symmes v. Frazier*, 6 Mass. 344; and the same doctrine is held in *Morse v. Bellows*, 7 N. H. 549, where the authorities were carefully considered, and it was laid down that if one, relying upon a promised reward for the apprehension of a culprit, performs the service, it is a good consideration for the previous promise, which thereupon becomes binding upon the promisor. So is *Wentworth v. Day*, 3 Met. 352.

The same doctrine is applied to similar offers by towns or cities. *Freeman v. City of Boston*, 5 Met. 56; *Loring et al. v. City of Boston*, 7 id. 409; *Cranshaw v. City of Roxbury*, 7 Gray, 374. The same doctrine is applied in the case of bounties offered by towns or cities to persons who may enlist into the military service of the United States. *Crowell v. Hopkinton*, 45 N. H. 9.

It is urged that the case before us differs from those in Massachusetts, upon the ground that here the authority was conferred by statute. We do not, however, perceive that this can affect the result. The statute clearly confers authority to offer rewards in such cases, and we can perceive no ground for any distinction between a power acquired by express enactment, and that which is incident to the general powers conferred by law upon towns, unless there be in the statute some limitation or qualification of that power.

The statute here (Comp. Stats. chap. 236) authorizes "the mayor and city council of any city, and the selectmen of any town or place, whenever in their opinion the public good may require it, to offer and pay from the treasury of such city, town or place, a suitable reward, not exceeding \$300 in any one case, to any person who shall, in consequence of such offer, apprehend and secure any person or persons charged with having committed any capital or other high crime."

In England, to encourage the apprehension and conviction of offenders, rewards were allowed to the amount of forty pounds by

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sundry acts of parliament, some of which were as early, at least, as the fourth of William and Mary, and in some cases a portion of such reward was to be paid by the hundred indemnified by the apprehension of the offender. 4 Blk. Com. 295; 2 Burn's Justice, 373. The same general policy has dictated our own law, and the laws of most of the American states, although here it has been thought better to provide for offering a reward suited to each particular case as it arises rather than to fix it by a permanent law at a uniform amount in the same class of offenses.

It is evident, however, that the policy of offering rewards by the public in some form, either by the state or a municipality, for the arrest and conviction of offenders, has long been well established; and it has ever been held that it may be done by towns and cities without being specially authorized by statute. *Cranshaw v. City of Roxbury*, 7 Gray, 374, before cited.

In England, in addition to the permanent allowance by law, it was common for parties interested to offer rewards in particular cases, and the authorities are numerous where such offers have been enforced. Ch. on Con. (9th Am. ed.), 477, note *a*, and many cases cited. In *Falli v. Barber*, 1 M. & S. 108, the policy of authorizing such rewards is ably vindicated.

Of course, the difficulties suggested by defendant's counsel in determining who among many claimants was entitled to the reward, must have been encountered. Among other cases upon that subject is that of *Lancaster v. Walsh*, 4 M. & W. 16, where a reward was offered to whoever should give information by which a crime could be traced and the offender convicted; and it was decided that he only who gave the *first* information was entitled to the reward; the court saying that, after that, a person could not be said to be informed by another telling the same thing, and holding only *one* reward was offered. PARKE, B., says, that if two jointly give the information, both must join in a suit for the reward.

It is obvious that the difficulties to be encountered in determining who is entitled to the reward are the same in the case of an offer by a standing law, by a private individual and by a municipal corporation; no difference has been suggested, and none can be perceived; and, as the policy in respect to rewards offered by law and private persons has long been well established, we think the authority conferred upon towns and cities should be construed, if it may be, in accordance with the well-settled policy upon that subject, and

we are unable to see any grounds for a strict construction of that authority, or for making municipal corporations, any more than individuals, their own judges of what, and to whom, they should pay. Indeed, it is fair to presume that, in authorizing towns to offer rewards, it was intended to put them upon the same footing as private individuals.

The case of bounties, as before suggested, stands upon much the same ground. By the statute, towns are empowered to offer and pay them to encourage enlistments; and here to offer rewards to encourage the apprehension and conviction of offenders. The policy of such laws is equally clear and well established in the two cases, and in respect to the former it is settled that the payment of the bounty may be enforced by suit.

It is to be observed, also, that courts are always reluctant to give a construction to a contract or a law that shall constitute a person a judge in his own case; and this reluctance has been of late largely increased, so much so, indeed, that it can hardly be said that such power of deciding one's own cause can be conferred at all. *Smith v. B. C. & M. Railroad*, 36 N. H. 458.

Unless, then, this power is expressly given to the city or town authorities, or is clearly implied from the language of the statute, it would be contrary to all rules of construction, and to precedent also, to give that effect to the law in question.

In the case before us, a reward was promised for the apprehension and conviction of the offenders, and the selectmen had authority to do it. If the service was rendered, relying upon this promise, the payment of the reward becomes a duty, which, as in the case of a bounty to recruits, may properly be enforced by suit. The promise is in behalf of the town. It is made by the selectmen in their official capacity, and substantially in the form adopted by the mayor of the city of Roxbury, as set out in *Cranshaw v. Roxbury*, before cited, and it was there held, that, as the mayor professed to act for the city, having signed the offer officially, and his authority being afterward confirmed, the city was bound by the promise.

Nor is there, we apprehend, any doubt that the selectmen had power to make such an offer in behalf of the town of Exeter. The statute, to be sure, empowers the mayor and city council, or selectmen, to offer and pay, but it is out of the money of the city or town, and it must, we think, be regarded as an authority to make such

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offer in their official capacity, and in behalf of the cities or towns, and not on their own account.

Upon these views the demurrer must be overruled.

Upon the other point informally reserved, we are of the opinion that all the parties who joined in performing the service for which the suit is brought must join as plaintiffs. It is obvious that two or more persons may join in detecting and apprehending an offender, and if they do so, they are jointly entitled to the reward, and should join in the suit. It is like other cases of joint service, and is governed by the same rules. If, indeed, sundry persons separately undertake to secure a culprit, and one without concert with others succeeds in apprehending him, he alone is entitled to the reward, and alone should sue. There may be cases where it might be difficult to determine whether certain persons did act in concert or not, but this cannot affect the rule that those who have jointly performed the service should join in the suit. If it were otherwise it would be an exception to the rules of pleading for which we find no precedent whatever, and the case of *Lancaster v. Walsh*, 4 M. & W. 16, before cited, is in point.

Exceptions sustained.

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(48 N. H. 111.)

Partnership — When creditors of individual partner cannot defeat title acquired to his lands by partnership creditors.

Where the creditors of a partnership have levied their execution on lands belonging to one of the partners, and their title has become absolute by lapse of the time prescribed by statute, a creditor of the individual partner cannot defeat their title by levying his attachment or execution on the same lands.

THIS was an action in the form of a writ of entry to recover possession of lands. The facts are sufficiently stated in the opinion.

Vose & Oushing, for plaintiff.

Wheeler & Faulkner, for defendant.

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PERLEY, C. J. The Cheshire Bank, creditors of C. Tolman & Co., levied their execution on land of Handy, one of the partners, on the 14th of September, 1858. The plaintiff, for a debt due from Handy alone, attached the same land in mesne process on the 12th of October, 1859, after the title of the bank under their levy had become absolute as against Handy by the lapse of a year from the time of their levy. The defendant has the title of the bank; and the main question would seem to be whether, after the creditors of a partnership have levied their execution on land belonging to one of the partners, and their title as to him has become complete by the lapse of a year, a creditor of the individual partner may take the same land for his debt and defeat the prior title derived under the levy for the partnership debt. There is no suggestion of any fraud in this case. If this may be done after one year, I see no legal reason why it may not be done at any time short of twenty years. Several serious inconveniences would follow from allowing the preference of an individual creditor to the application of his debtor's property to be asserted after the same property had been finally and absolutely appropriated to the payment of a partnership debt under legal process.

The levy of the execution is by law made the public evidence of title. It is required to be returned into court, and also to be recorded in the registry of deeds, which the law provides for giving publicity to all titles in land. The execution creditor, after the lapse of one year from the time of the levy, would appear by the record to have a complete title under the law which provides for the application of a debtor's property to the payment of his debts; yet he, and purchasers under him, if the claim here set up were admitted, would be liable to have their title drawn in question until the claim was barred by the general statute of limitations.

Then, again, if the claim to this preference over the property of the individual partner could be made at an indefinite time after it had been levied on for a debt of the firm, it would greatly embarrass the settlement of the partnership accounts; for the partnership accounts could not be finally adjusted till it was certainly known that there was no outstanding demand against the partner, that might be levied on the same land which had been taken for the partnership debt. Until the title under the levy for the partnership debt was defeated by a levy for the private debt of the partner, it would appear that he had paid the partnership debt by the levy

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on his land out of his private funds, and that he should be allowed for it in settling the partnership account; and when the title under the levy was defeated by the individual creditor, he would be liable to the partnership for the amount of the debt levied on his land, if it had been allowed him in settlement.

If the preference of the individual creditor to the property of his debtor could be claimed after it had been finally appropriated to the payment of a partnership debt, it would seriously impair the remedy which the law gives to the creditors of a partnership for the satisfaction of their debts. The preference of the individual creditor does not in this state, though it is otherwise in some jurisdictions, depend on the question whether the property of the individual is such that enough will be left to pay the individual debt without coming on the property taken for the partnership debt. The creditor of the individual partner may enforce his preference, if seasonably claimed, though the party of the partner was abundantly sufficient to pay all his individual debts and all debts of the partnership. In this case, for instance, it does not appear, and it was not necessary for the plaintiff to show, that Handy had not property enough to pay all his private debts and also this partnership debt. In such a state of facts, where there is abundance of the partner's property liable by law to pay the individual and partnership debts, if the individual creditor allows the partnership creditor to appropriate his debtor's property to the payment of the partnership debt, and afterward, when the partnership debt is satisfied by the levy, defeats the title under it by interposing his individual claim, what remedy has the partnership creditor for his debt?

His judgment is satisfied, and his debt is gone; the officer's return of the levy shows this; and he can have no further proceedings for his debt, unless, which is at least doubtful, he can revive his judgment by the action of debt which the law gives where the judgment was satisfied "by an extent or levy upon estate or property not liable to be taken on the execution." Such a case certainly does not come within the terms of the statute which gives this action of debt; for the property of the partner is liable to be taken, and is rightfully and legally taken, on the execution against the partnership, and the title under the levy is good until it is defeated by matter arising subsequently to the levy. But suppose, after the lapse of a year, or ten or fifteen years, from the time of the levy, the title under it is defeated, and the partnership creditor brings his action of debt

against the partnership, and recovers a new judgment, what is his chance worth of then finding property of the individual partner to answer for the debt, though when he made his levy there was abundance of other property that might have been taken on his execution?

This equitable preference extends to personal as well as real estate. If no claim of an individual creditor is interposed, the officer who serves an execution against the partnership is authorized to take, and, if necessary to satisfy the execution, is bound to take, personal property of the individual partner, and sell it on the execution. Certainly no claim can be made by the creditor of the individual partner against the officer who took and sold the property on the execution according to his duty and his precept; and it is equally clear that no such claim can be maintained against the purchaser at the sheriff's sale. It would seem to follow, that if the individual creditor would assert his preference over the personal property of his debtor, he must do it while the proceedings are *in fieri* and the property is in the custody of the law, and that he must be understood to have waived his right, if he makes no claim till the property has been finally appropriated to the satisfaction of the partnership debt.

These are some of the reasons which lead me to apprehend that, if this claim to defeat the title derived under a levy for a partnership debt at an indefinite period after the levy was complete were admitted, the remedy of creditors for partnership debts would be seriously impaired, and the affairs of the partners and of all who were interested in the settlement of their accounts be left for a long time in a state of great uncertainty and embarrassment.

On the other hand, I can see no ground that the creditor of the individual partner has to complain if he is required to bring forward and assert his rights to a preference in the application of his debtor's property before the partnership creditors have made a final and absolute appropriation of the same property to the payment of their debts under legal process. When a partnership fails and the property of the firm and of an individual partner is taken for their debts, the legal proceedings are of a public character. The personal property is taken into the custody of the law; the attachment of land is filed with the town clerk for notice to all who are interested in the title; the levy of the execution is returned into court, and also recorded in the registry of deeds. By these different provisions the law has taken care that all persons interested shall have the

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means of knowing with ordinary diligence what claim is made to the property; and it is the evident intention of the law to charge all those who have any conflicting claims to the property with notice of these legal proceedings. The reason of the rule which makes a pending suit relating to the title of land notice to all the world, applies here in full force. It is in substance and effect a proceeding *in rem*, as was held in *Benson v. Ella*, 35 N. H. 402. In that case, as in this, the question was upon the claim to a preference in the application of property for the payment of partnership and individual debts; and it was held that the creditor of the partnership, by omitting to make his claim in due time and proper legal form, was held to be waived, and lost his equitable right to a preference in the application of the property attached. As to the character and effect of the proceedings by which under our statutes property is applied to the payment of debts, the court say (page 418:) "In the institution of a suit, and prosecuting it to judgment, the proceedings are attended with so much publicity and notoriety that it may be consistently assumed, that all persons claiming liens which may be defeated by reason of the priority to which the debt declared on in the suit is entitled have opportunity to make themselves parties to the proceedings. In proceedings which operate *in rem*, notice to all interested and an opportunity to appear and assert their rights are always presumed, and this presumption lies at the foundation of the doctrine, that judgments *in rem* are conclusive upon all persons. As to the priority to which the judgment is entitled by reason of the character of the debt on which it is founded, the judgment may be considered as in the nature of one *in rem*. The debt when it is passed into judgment becomes merged in it, and the priority which attaches to the debt follows as one of the legal consequences of the judgment, binding the property, in the application of it to the payment of debts, to the preference to which the debt is entitled. In this view the judgment, in its effect and operation, is strictly in the nature of a proceeding *in rem*." The general doctrine here asserted, that the notoriety of the proceedings by which the law applies the specific property of a debtor to the payment of his debts gives them the character of a proceeding *in rem*, is applicable to the question in this case as well as to that in *Benson v. Ella*. The general principle applied in this case I take to be this: when all the steps prescribed by law have been followed and the property of a debtor has been applied finally under the law 'c

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the payment and satisfaction of a debt, all the property of the debtor in the thing so appropriated has passed to the creditor against all the world; any other conflicting claim to the application of the property must be interposed before the debt has been satisfied by the levy and the lapse of a year afterward; and the express provision of the statute would seem to be to the same effect, for by section 12 of chapter 218 general statutes, adopted from revised statutes, chapter 195, section 12, "all the debtor's interest in such real estate shall pass by the levy as against all persons." But if the same property could be taken for another debt of the same person, all the debtor's property would not have passed as against all persons. If creditors of another class can take the land for their debts, as to them the debtor's interest did not pass under the prior levy. I am unable to see why this provision of the statute is not decisive that when the levy is regularly made and pursued, the same property cannot be taken for another debt of the former owner.

The law gives the creditor of the individual partner all reasonable opportunity to make his claim to a preference before the creditor of the partnership can complete his title upon a levy of his execution. The individual creditor cannot be heard to say that he has wanted opportunity to assert his right to a preference over his debtor's property while the proceedings were pending. If he allows the partnership creditor to attach the land of the partner, and levy his execution on it, and does not, within a year afterward, take any steps to assert his equitable preference, it is quite reasonable to infer that he has other security with which he is content, and that he has waived his right to the preference; and I think the creditors of the firm have the right to make that inference.

If it should be suggested that the debt due from the individual partner may not be matured, so as to allow a suit and attachment for his debt until after the property is applied to satisfy the debt of the firm, it is a sufficient answer to say that such a creditor is in no different situation from any other who has chosen to give a long credit, and thereby loses his opportunity to secure his debt on the property of a failing debtor; and besides, if equity required it, the legal proceedings might be stayed till the claim on the individual property could be enforced at law. *Crooker v. Crooker*, 46 Me. 250; *Morrison v. Blodgett*, 8 N. H. 238, 248. It is very material to bear in mind that the creditors of the partnership, in taking the property of the partner for their debt, do no wrong and are guilty

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of no fraud, for the property of the individual partner, so far as he is concerned, is just as much liable for the partnership debts as the partnership property: *Devagnes v. Noble*, 1 Merr. 359; *Wisham v. Lippincott*, 1 Stock. 353; *Washburn v. Bellows Falls Bank*, 19 Vt. 287; and till the individual creditor interposes his claim to a preference, the partnership creditors cannot be supposed to know that the property will be needed for the satisfaction of debts against the individual partner. The creditors of the firm, when they take the property of a partner for their debt, do not set up any claim in conflict with the rights of his creditors. Their claim is subject to his right of preference, if he asserts it seasonably. And this broadly distinguishes the present case from that of a conveyance of partnership property by the partners, to pay the individual debt of a partner; for in that case the appropriation of the partnership property to pay the individual debt, if it can take effect, is absolute and final. The property pledged to pay the partnership debt is, by the voluntary act of the partners, diverted from that object, and placed beyond the reach of the partnership creditor, who has no remedy but by a direct attack upon the conveyance; whereas, when the creditors of a firm, in the exercise of an undoubted legal right, attach the property of a partner for the debt of a failing partnership, they merely put the property in the custody of the law, to be marshaled and appropriated according to the rights of the respective parties who make legal claim to it. The cases in which it has been held that a conveyance of partnership property to pay the debt of a partner, when made to prevent it from going to pay partnership debts, is a fraud on creditors of the firm, do not seem to have any bearing on the present case; for certainly there can be no fraud in the legal and rightful attachment of the property, or in the levy of the execution on it for the partnership debt, when no conflicting claim of another creditor is asserted or-notified.

The rule which gives the creditors of a partnership a preference over the property of the firm for the satisfaction of their debts, and the creditors of an individual partner a corresponding preference over his private property, was unknown to the early common law. It had its origin in the administration of the bankrupt law, and is now, as I understand, adopted in England as a general doctrine of equity in the marshaling of assets belonging to partnerships and the individual partners in cases of insolvency. In bankruptcy, when this rule is applied, the property of the partnership, and also

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of the individual partner, is all brought before the commission, and passes to the assignee. The respective claims are proved, the funds are marshaled and distributed, and finally applied according to the equitable rule before any creditor of either class can reach them. If there is a surplus of the private fund, it is transferred to the partnership fund, and so, *vice versa*, nothing is left to future question or inquiry. The appropriation is conclusive and final. *Ex parte Elton*, 3 Ves. 328; *Dutton v. Morrison*, 17 Ves. 207 (Lord Loughborough's order of March 8, 1794); 2 Cook's Bankrupt Laws, 375; *Jarvis v. Brooks*, 23 N. H. 136.

When the question arose here as to this equitable doctrine, we had no bankrupt law in force, nor any general insolvent law; and in most of the New England states the courts had no general jurisdiction in equity. There was no method by which debtors could be decreed bankrupt or insolvent, and their effects brought directly within the power of the court, to be marshaled and appropriated according to this equitable rule. The justice and expediency of the rule were, however, generally admitted; and though there was no decree or judgment which declared the defendants to be bankrupt or insolvent, yet, where partners, as such, and the individual partners were sued for the partnership and individual debts, and the individual and partnership property taken in legal process, it was apparent, in most such cases, that there was an actual insolvency which called for the application of the equitable doctrine. The property attached being held in the custody of the law, the courts undertook to administer the equitable doctrine as far as they were able, by appropriating the property according to this rule without regard to the order of the attachment. The machinery of our courts did not allow them to proceed according to the methods used in England, but they adopted the doctrine and administered it as far as they were able, by marshaling and appropriating the assets under our laws which provide for the satisfaction of debts by attachment and levy, and relied on the jurisdiction in equity to supply the defects of their method as well as it might: *Morrison v. Badgett*, 8 N. H. 248; *Tillinghast v. Chaplin*, 4 Ames (R. I.), 173, in which case it is said that even the courts of law administer the equitable doctrine in New England under our attachment laws in cases of *quasi* insolvency, by giving to the creditor of the firm, though subsequently attaching the firm's property, a priority of lien and payment upon and out of such property. Per AMES, J.

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I see nothing which leads to the conclusion that when this doctrine was adopted here there was any intention to admit it in practice farther than it could be administered and finally applied by the courts under our laws for the satisfaction of debts out of the debtor's property, in analogy to the course of the courts from which we have borrowed the doctrine. In England the preference must be claimed while the property is in the custody of the law, and the final distribution is made by the tribunal that has charge of the property and administers the equitable rule. The grounds on which the doctrine was admitted here afford no reason for supposing that this right remains to be asserted after the property, once taken for the satisfaction of debts, has been finally appropriated under legal process by levy on the property of the individual partner.

If we look to the decisions in other states, so far as my inquiries have gone, there is nothing in them to sustain the position that this preference can be claimed after a final appropriation of the property under legal process to debts of the other class. Where the question has been considered the decisions lead in the other direction. *Cover's Appeal*, 29 Penn. 1; *Wisham v. Lippincott*, 1 Stock. (N. J.) 353; *Baker v. Wimpee*, 19 Geo. 87; *Glyhorn v. Insurance Company*, 9 id. 319; *Coffin v. Taylor*, 21 Wend. 676.

In *Clegborn v. The Bank of Columbus*, 9 Geo. 319, it was held that the equity in favor of the separate creditors will not be allowed to control or take away a right acquired by an execution at law on the part of the joint creditors against the separate estate. LUMPKIN, J., delivering the opinion of the court, said: "The equity in favor of the separate creditors will never be enforced to control or take away a right acquired by legal execution on the part of joint creditors against the separate estate." And *Baker v. Wimpee*, 19 Geo. 87, is to the same point.

So in *Wisham v. Lippincott*, 1 Stock. 353, it was decided that "a joint creditor cannot be compelled in equity to proceed against the joint estate before resorting to the separate property of an individual member of the firm, by the partner whose separate estate is resorted to; that this would be inconsistent with the well-established principle that the partnership contract is several as well as joint. The principle that separate creditors of each partner are entitled to be first paid before the partnership creditors can claim any thing, cannot apply to creditors who have secured their debts by judgment and execution liens." WILLIAMSON, Chance'l'or, says in that case:

"A court of chancery may undoubtedly, where the equities between the partners are to be adjusted and where the assets are before the court, and the court called upon to marshal them, apply such a rule. I have no hesitation in saying that when a joint creditor of a firm has a judgment and execution levied upon the separate effects of one of the partners, this court ought not, in mere compliance with any such rule as that the separate creditors of each partner are entitled to be first paid out of the separate effects of their debtor before the partnership creditors can claim any thing, to interfere with such execution either on application of one of the partners or any creditor of the firm, or separate creditor of any of its members."

In *Crooker v. Crooker*, 46 Me. 250, 264, the question was as to the preference claimed by creditors of the firm over land held by one of the partners in trust for the firm, and, in that case, though the point was not directly decided, it was evidently understood that the preference must be claimed before a judgment and levy by the other class of creditors. MAY, J., says; "Where there are outstanding equities or trusts which a court of equity will enforce, the attaching creditor is not regarded as acquiring, by force of his attachment merely, any right which is in its nature higher than the equitable rights which exist. These will be regarded as existing until the attachment is perfected by a judgment and levy."

In some of the states it seems that creditors cannot come upon the fund which the equitable rule appropriates to the other class, until it appears that the funds of their own class are insufficient, and also that the other funds are not required for the satisfaction of their own class of debts. *Daniel v. Townsend*, 21 Geo. 155; *Morrison v. Kurtz*, 15 Ill. 193; *Gadsden v. Kasson*, 9 Rich. Eq. 252; *Flemming v. Billings*, id. 518.

These authorities from decisions in other states are very strong to show that, after the property of an individual partner has been appropriated under legal process to the payment of a partnership debt, the creditor of the individual partner cannot defeat the title derived under the levy for the partnership debt by taking the same property on his execution against the individual partner. And I have found no authorities at all in conflict with those to which I have referred. Everywhere, so far as my inquiries have gone, the preference must be claimed while the property is in the control of the court, and may be marshaled according to the equitable rule, by the order of the court or by auxiliary proceedings at law or in

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equity, and cannot be set up after the property has been applied by levy or sale to the satisfaction of the partnership debt.

When we turn to the law of this state, it is to be observed that this is the first attempt, so far as I am informed, that has been made to defeat a title derived under a levy for a partnership debt, on the ground that the land ought to go in payment of a debt due from the individual owner instead of being applied to pay a debt which he owed as partner; and I have met with no decision or dictum in any of our cases tending to show that this can be done. I do not find that we have any decision directly in point, but in several cases the equitable right to this preference has been explained and defined, and its limitations carefully stated.

In *Morrison v. Blodgett*, 8 N. H. 238, 248, PARKER, J., after tracing the equitable doctrine to its origin in England, says: "If the courts of law are unable to carry out the principles of equity by distributing the joint and separate effects among the joint and separate creditors respectively, it may be well that they have been disposed to follow the principles established in chancery, so far as the nature of their proceedings will admit, leaving the equity jurisdiction to supply, as well as it may, the deficiency." In England the assets in bankruptcy are all in the control of the court, and before they can be reached by any creditor are distributed according to the equitable rule, by the orders of the court.

The property, in our practice, is attached in a suit by the creditors of the firm and of the individual partners; and the court have not the same control over the funds by direct decree as in bankruptcy. But what they undertake to do is to distribute the joint and separate effects among the joint and separate creditors respectively as well as they may, and leave the rest to the jurisdiction in equity. They marshal the effects and distribute them according to the equitable rule as well as they may, and leave the rest to equity. This is Judge PARKER's view of the way in which the right to this preference is administered under our laws for the satisfaction of debts. The effects taken for that purpose are to be distributed according to the equitable rule by the courts of law as far as they can; and equity may interpose to supply the defects of the proceedings at law. We have adopted the English doctrine, and we administer it as well as we can at law. But in England the effects are marshaled and finally distributed by the court that holds them in control; and certainly it could not have been understood by Judge PARKER,

that, after the land of a partner had been applied to pay a partnership debt under our laws for the attachment and levy of land, the title under it could be attached in a suit at law, claiming the land by virtue of a levy begun under proceedings instituted after the former levy was complete.

In *Crocket v. Crain*, 33 N. H. 550, EASTMAN, J., says: "The fact that a lien has been created by attachment in favor of a partnership creditor does not give him any advantage over the separate creditor; for the latter may, notwithstanding the previous attachment, attach and hold the property for his debt. Until the property is actually and legally applied to the payment of the partnership debt, the separate creditor may interfere to prevent such application and cause his own debt to be first satisfied."

In *Benson v. Ela*, 35 N. H. 418, it was held, as has been before maintained, that the proceedings, by which under our laws the property of debtors is applied to different classes, are *in rem*, and of course the rights of all parties finally determined by the proceedings. This was not the main point decided in the case, but it was one of the steps necessary to reach the decision, and cannot therefore be regarded as the mere individual opinion of the learned judge who delivered the judgment of the court, though his individual opinion on a question of this sort would be entitled to the highest respect. In the same case the process is laid down (page 411), by which the respective claims of different creditors are to be determined in our practice. The decision and all the reasoning of that case go on the assumption that the rights of all claimants to the property, so far as the debtor's interest in it are concerned, are to be conclusively determined before there is a final application of it under process of law, and that when it is so applied, the debtor's interest in it passes under the levy to the execution creditor. If it has been misapplied, the remedy is not by attaching the title to the property derived under the levy, but by action against the party who has misapplied it.

So in *Holton v. Holton*, 40 N. H. 78, it is said by FOWLER, J., that "it may be considered as well settled that the separate creditors of a partner have a preference over the separate estate of their debtor for the satisfaction of their debts, until it shall have been actually and legally applied and appropriated." I think it very clearly appears by reference to the cases in this state, that it has all along been understood and conceded that this equitable preference must

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be claimed before the property is finally applied on execution to the payment of a partnership debt; that a completed levy for a partnership debt passes the title of the debtor to the execution creditor, and after that the preference cannot be claimed.

It is not necessary here to inquire whether the preference might be claimed after the levy was made and before the expiration of the year allowed for redemption, as the plaintiff's attachment was made after the lapse of that time.

It is, as I think, against the policy and plain intent of our laws for the satisfaction of debts, that after a suit has been instituted, land attached for a debt, judgment rendered, the land of the debtor set off on execution in satisfaction of the debt, the levy returned and recorded in the registry provided for giving publicity to all titles in land, the same land may be taken for a debt against the same debtor, and the prior title under the legal proceedings defeated; and such a claim also appears to me in direct conflict with the express provision of the statute, before cited, that after such proceedings and levy "all the debtor's interest in such real estate shall pass by the levy as against all persons," etc. General Statutes, chap. 208, § 12. In this case all the steps required by the statute were taken and the levy legally made; why, then, in the absence of fraud, should not all the interest of the debtor, *as against all persons*, pass to the creditor, as the statute expressly provides.

I find nothing in the practice of the English courts from which we have borrowed this equitable doctrine, nor in the law of other states, which gives any countenance to the position that after land of a partner has been applied in satisfaction of a partnership debt by the completed levy of an execution, the title derived under the levy can be defeated by a creditor of the individual partner, who first asserts his claim after the title under the former levy is complete. In all other jurisdictions, so far as I am informed, the claim to the preference must be made before the appropriation of the land to the payment of the other class of debts is complete under legal process. In this state, though we have not an authoritative decision directly in point, we have a great weight of judicial opinion clearly and carefully expressed against the claim made by this plaintiff.

After the creditors of a partnership have levied their execution on land belonging to one of the partners, and their title under the levy has become absolute by the lapse of a year, I think that a cred-

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itor of the individual partner cannot take the same land, and by the levy of his execution defeat the title derived under the previous levy for the partnership debt, and that on the case stated the defendant is entitled to judgment.

YOUNG, executor, v. STEVENS

(48 N. H. 123.)

Contract — when void for mental unsoundness of party to.

A., having a life estate in certain lands and owning stock thereon, conveyed the same to defendant on condition that he should support her for life, which he did. After her death her executor brought action to recover for use and occupation of the lands and for value of the property, alleging that the conveyance was void, A. being mentally imbecile at the time it was made. *Held*, that the plaintiff could not recover in the absence of bad faith or fraud on the part of the defendant.

THE plaintiff's testatrix, having a life estate in a farm and owning the stock and grain thereon, entered into a contract with the defendant, whereby she leased or surrendered to him her interest in the farm and conveyed to him absolutely the stock thereon, in consideration that the defendant should support the said testatrix during her life. The defendant took possession of the farm and stock under this agreement, and did support said testatrix until her death. The plaintiff brought this action to recover the value of the stock and of the use and occupation of the farm, alleging and offering to prove that the testatrix was mentally imbecile at the time the contract was made. He was nonsuited on the opening.

Wheeler, for plaintiff.

Crushing, for defendant.

NESMITH, J. The plaintiff, under his first count, seeks to recover for two weeks' board in 1864, as furnished by his testatrix to the defendant, for which the sum of \$7.00 is charged, and also for sundry articles of personal property, such as provisions, etc. Probably some of these may be due, and may be recovered under plaintiff's first count, as having been delivered to the defendant under an express or implied contract, binding the defendant to pay for them.

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The main dispute involved in the case arises out of the special contract of the testatrix, as made with the defendant on the 4th day of May, 1865. It is understood that, under this contract, the defendant agreed to take the lands in which the said Eliza Young had a life estate, also the stock on her farm, and to support the said Eliza during her natural life; and, according to the requirements of said contract, the defendant now claims the full performance, the said Eliza having deceased. On the other hand, the plaintiff claims that no title passed under this contract to defendant, by reason of the incapacity of said Eliza, she at the time laboring under mental imbecility. Wherefore, the plaintiff claims that the defendant should pay for the use of the premises enjoyed by him, and for the value of the stock taken under the written contract, and for the board of self and family during its existence; in short, that the whole of said written contract should be regarded as rescinded. It will be seen that the ruling of the court stands upon the plaintiff's own statement of his case, and it will be presumed to be stated as strong in his favor as the facts will justify.

The rules, definitions and limitations, as laid down by Judge BELL, in *Dennett v. Dennett*, 44 N. H. 531, are to be regarded as safe for our guidance, as applicable to the subject of mental imbecility or insanity, when existing in either party to executory or executed contracts. Every person may be deemed of unsound mind who has lost his memory and understanding by reason of old age, sickness, or other accident, so as to render him incapable of transacting his business and of managing his property.

As a commentary upon this comprehensive general rule, we may remark that the common law seems not to have drawn any nice discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it. *Jackson v. King*, 4 Cow. 216. When it appears that a grantor had not strength of mind and reason sufficient to understand the nature and consequences of his act in making a deed, it may be avoided on the ground of insanity. In other words, a man, by the bare execution of a written instrument, does not make it his deed, if at the time he was so weak in mind as to be incapable of understanding it, if explained to him, or the effect of the act he is about to perform. The question then, in cases where incapacity to contract from defect of mind is alleged, is

not whether a person's mind is impaired, nor whether he is afflicted by any particular form of insanity, but whether the powers of his mind have been so far affected by his disease as to render him incapable of transacting business like that in question. Weakness of understanding is not of itself any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions. The doubtful and uncertain point at which the disposing mind disappears, and where incapacity begins, can be ascertained only by an examination of all the circumstances of each particular case, to be duly weighed and considered by the court and jury; and, in determining the question, the common sense and good judgment of this tribunal must be mainly relied on.

The familiar rule of evidence is adopted here that every man is presumed to be sane until the contrary appears, and the burden of proof is on the party who asserts the want of capacity. *Pettes v. Bingham*, 10 N. H. 514. Nor is there any doubt as to the rule of practice here, which is that insanity may be either pleaded or given in evidence, as a bar to an action founded either upon an executory or executed contract. *Burke v. Allen*, 29 N. H. 106; *Leaver v. Phelps*, 11 Pick. 304; *Rice v. Peet*, 13 Johns. 543; *Thompson v. Leach*, 3 Mod. 310. In England, we have the recent case of *Molton & Wife, Admin'rs, v. Camroux*, 2 Exch. 500, wherein Chief B. POLLOCK has ably investigated the question, when and how far insanity or lunacy may be an answer to a complete or executed contract, and under what circumstances such a contract may not be rescinded. POLLOCK says: "We are not disposed to lay down so general a proposition as that all executed contracts, *bona fide* entered into, must be taken as valid, though one of the parties be of unsound mind. We think, however, we may safely conclude that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bona fide*, and which is executed and completed, and the subject-matter of the contract has been paid for and fully enjoyed, and cannot be restored, so as to put the parties in *statu quo*, such contract cannot be afterward set aside, either by the alleged lunatic or those who represent him." The case where this doctrine was held was *assumpsit*, brought by the representatives of the deceased person, Thomas Lee, to recover back certain annuities which had been purchased by said Lee in his life-

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time, without the knowledge on the part of the officers of the annuity society of any unsoundness of mind in Lee, the trade being in the ordinary course of the affairs of human life, and fair and *bona fide* on the part of the society. It was held that, after the death of the lunatic, his personal representatives could not recover back the premiums paid for the annuities.

Justice STORY remarks that courts of equity will watch with the most jealous care every attempt to deal with persons *non compos mentis*, and asserts that where a contract is entered into with good faith, and is for the benefit of such person, as for necessities, courts of equity as well as courts of law will uphold it. And so, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage has been taken of the party, courts of equity will not interfere to set the contract aside, if injustice will thereby be done to the other side, and the parties cannot be placed in *statu quo*, as before the purchase. In this way, as in the case of infants, this class of persons are protected. But the rule of law is used, as it was designed, for a shield. It is not allowed to work a fraud and injustice to others. 1 Story's Equity, § 228, and cases in note; *Neill v. Morley*, 9 Ves. 478; 2 Kent's Com. 240; *Sprague v. Duesell*, 11 Paige Ch. 480; *Loomis v. Spencer*, 2 id. 153; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

Upon the grounds and reasons suggested in the aforesaid cases, the plaintiff will not be permitted to rescind the contract of his testatrix without showing fraud, undue advantage, or imposition in the defendant; for the labor and services of the defendant have now largely entered into the contract, and they cannot be restored to him, or compensation as an equivalent be easily made therefor. The doctrine is well established, that no contract can be rescinded unless both can be restored to the condition in which they were before the contract was made. If, therefore, one of the parties has derived an advantage from the performance of the contract, he cannot hold this, and consider the contract as rescinded, but must do all that the contract obliges him to do, and, in such cases, seek his remedy in damages. 2 Parsons on Con. 192; *Hunt v. Silk*, 5 East, 449; *Hill on Sales*, 308, 377; *Poor v. Woodman*, 25 Vt. 445; *Miner v. Bradley*, 22 Pick. 458; *Stevens v. Cushing*, 1 N. H. 17; *Weeks v. Robie*, 42 id. 316, and cases cited.

But even assuming the contract to be void in the case before us by reason of the mental imbecility of the testatrix to the extent as

Young v. Stevens.

alleged by plaintiff's counsel, then what will be the legal result? In such case Greenleaf says: "The executed contract of a person, alleged to be *non compos*, is to be regarded very much like that of an infant, and that, therefore, where goods have been supplied to a party, which were necessities, or were suitable to his or her station or employment in life, and which were furnished under circumstances evincing that no advantage of his or her mental infirmity was attempted to be taken, and which have been enjoyed by such party, then he or she is liable in law as well as in equity for the value of the goods." 2 Greenl. Ev. 369, and cases in notes; 3 Carr. & Payne, 30; 2 id. 178; Chitty on Con. 108; Story on Con. §§ 23, 24; *Kendall v. May*, 10 Allen, 62. The latter case in Massachusetts shows what may be regarded as necessities for a wealthy insane person, and is interesting in some of its illustrations. In *McCrillis v. Bartlett*, 8 N. H. 569, it has been settled, that, although the statute may avoid the contracts of spendthrifts for their protection, yet, at the same time, it does not avoid their implied contracts or liabilities for necessities. In this case, the defendant had furnished his own personal services and pecuniary aid to the spendthrift to resist the appointment of a guardian over him, upon probable grounds of success. The court held that such money and aid might be considered as necessities, as the spendthrift might resist the appointment of a guardian.

From the aforesaid legal authorities there is no doubt that the defendant is entitled to claim under his written contract compensation for any and all actual benefits rendered to the testatrix or her estate, using the term *necessaries* in its liberal sense. And on a fair construction of the case before us, and a review of the authorities bearing on this subject, we come to the conclusion that there is nothing stated in plaintiff's case indicative of any want of good faith on the part of the defendant; nothing tending to show that he has practiced any fraud, artifice, or imposition upon plaintiff's testatrix, in procuring the contract. There is nothing to show that defendant had knowledge of any mental imbecility of the testatrix, provided she actually had such infirmity, and it therefore seems to us, that, so far as relates to the inception of the written contract and the things done under it, the plaintiff cannot sustain this action, and that the nonsuit must stand. As to any claim outside of the written contract, including board and provisions, the plaintiff can proceed for whatever may be due.

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HALL v. COSTELLO.

(48 N. H. 176.)

Contracts tending to violate laws of foreign country — Proof of foreign laws.

Plaintiff and defendant, in pursuance of an agreement to that effect, went to Canada in 1864 for the purpose of procuring men to be enlisted in the United States army, and before going, and also while there, plaintiff loaned to defendant money to pay his expenses. In an action to recover such money, *held*, that the contract, having for its object the violation of a law of Canada, was void, and that the plaintiff could not recover.

In proof of the laws of a foreign country, the testimony of any person, whether a professed lawyer or not, who appears to the court to be well informed on this point, is competent.

THIS was an action of assumpsit to recover money had and received.

The plaintiff and defendant, both residents of New Hampshire, made an agreement in 1864 whereby they were to go, and did go, to Canada for the purpose of procuring men for enlistment into the United States army. The profits of the enterprise were to be divided between them. Before leaving New Hampshire, and also while in Canada engaged in the business, the plaintiff loaned the amount involved to defendant toward paying his expenses. Both parties returned home without bringing any men, and plaintiff brings this action to recover the money loaned. It appeared that they knew at the time that procuring men in Canada to enlist in the United States was a violation of the laws of Canada.

To prove the statutes and laws of Canada prohibiting enlisting men for the United States army, two respectable attorneys of New Hampshire were sworn, who testified that, having occasion theretofore to examine the said laws on the subject, they had applied to prominent lawyers of the dominion who were familiar with the law, and that they showed them and explained to them the laws on the subject, and gave them the copies produced as evidence. The case was reserved for this court.

Whidden & Heywood, for plaintiff.

Bingham, Burns & Fletcher, for defendant.

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NESMITH, J. The facts found in this case clearly evince that a contract was made by the parties in this state, to be performed in Canada. The general rule is, that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed. Lord MANSFIELD, in *Robinson v. Bland*, 2 Burr. 1077; Story on Con. of L. 233, 234; 2 Kent's Com. 459; *Blanchard v. Russell*, 13 Mass. 4; 2 Met. 398; *Mather v. Bush*, 16 Johns. 233. It is also a general rule, applicable to contracts, that no people are bound to enforce, or hold valid in their courts of justice, any contract which is injurious to their public rights or offends their morals, contravenes their general policy or violates a public law. Story on Con. of L. 203, 215. Whatever constitutes a good defense by the law of the place where the contract is made, or is to be performed, is equally good in every other place where the question is litigated. 2 Kent, 459.

The plaintiff advanced his money to the defendant in this state, as well as in Canada, for the manifest purpose of carrying into effect a contract, the direct tendency of which was to violate a public law of that country. The contract must be, therefore, treated as void, and the money paid under it cannot be recovered back. In *Smith v. Bromley*, Dunlop, 695, note, Lord MANSFIELD says: "If the act is itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action to recover back the money, for where both parties are equally criminal against such general laws, the rule is, "*potior est conditio defendentis*." 1 Story's Eq., §§ 296, 298. In note to section 298 the authorities at law and in equity are collected. *Cutler v. Welch*, 43 N. H. 498; *Lewis v. Welch*, 14 id. 294; *White v. Hunter*, 23 id. 128; *Brackett v. Hoyt*, 29 id. 264; *De Grout v. Van Deuzen*, 20 Wend. 390.

The plaintiff objects to the mode in which the foreign law of Canada was proved in this case. In proof of the laws of a foreign country, the testimony of any person, whether a professed lawyer or not, who appears to the court to be well informed on the subject, is competent. *Pickard v. Bailey*, 26 N. H. 152, and authorities cited.*

* In the earlier cases it was held that written foreign laws could only be proved by copies thereof properly authenticated. *Church v. Hubbard*, 2 Cranch, 187; *Packard v. Hull*, 2 Wend. 211; *Chanotte v. Fowler*, 3 id. 173. In *Evans v. Smith*, 14 How. (U. S.) 400, statute books containing foreign laws, proved to have been published by the authority of the government which made the law, were admitted. In *Kenny v. Clarkson*, 1 Johns. 385, and in *Lincoln v. Battelle*, 6 Wend. 475, it was held that foreign laws could not be proved by parol. In *Jones v. Moffit*, 5 Serg. and Rawle, 523, a copy of

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Foreign laws are to be proved as facts by evidence addressed to the court, and not to the jury. *Id.*; 1 P. Wms. 431; 2 Cranch, 236; *Thompson v. Ketchum*, 8 Johns.; *Francis v. Ocean Ins. Co.*, 6 Cow. 429, and note; *Lincoln v. Battelle*, 6 Wend. 475; *Dollfus v. Frosch*, 1 Den. 367; *Munroe v. Douglas*, 1 Seld. (5 N. Y.) 447; Story on Con. of L. 528. The general principle, that the best testimony or proof shall be required which the nature of the thing admits of, applies to the proof of foreign laws as well as to other facts. Story, 528, 529.

In this case the testimony of respectable attorneys in this state was received, who had a direct interest to investigate this precise question in Canada, and who had their information from authentic and well-informed sources. The foreign statute law, prohibiting the enlistment of soldiers in Canada, or within the jurisdiction of Great Britain, to be employed in such service here, and imposing high penalties upon such as might offend against the same, was pointed out, or furnished to the witnesses, by those who were practicing daily under the law, and had the best means of becoming fully acquainted with its provisions and all the law applicable to this class of offenses, and had no occasion to misrepresent. Hence we are inclined to believe that the law prohibiting the contract of the parties in this instance was properly proved and authenticated by competent testimony, and that the plaintiff cannot maintain this action to recover any part of his advancements.

The counsel for plaintiff abandons the payment made to defendant in Canada. As to the other sum, advanced here, the true test to be applied, in order to determine whether plaintiff can collect it, is, whether the plaintiff requires any aid from the illegal transaction to establish his case. *Simpson v. Bloss*, 7 Taunt. 246; *Callagher v. Hallet*, 1 Caines, 104. We do not feel called upon to decide whether the plaintiff's or defendant's statement of the contract was in every respect the most correct in point of fact, but, under all the circumstances, it appears to us impossible so to separate and apply the testimony in the case as to leave the plaintiff an innocent party. Under the agreement he was to profit by the defendant's services.

an Irish statute, sworn to by an Irish barrister as correct, and as having been received by him from the king's printer, was admitted. In the following cases parol evidence of foreign written laws has been held admissible. *Sussex Peerage Case*, 11 Clark and Fin. 85; *Bode's Case*, 8 Ad. and El. (N. S.) 206; *Vanderdonck v. Thellusson*, 8 Man. Grang. and Scott, 512 (in this case the witness was not a lawyer); *Burrows v. Downs*, Sup. Ct. of R. I. to appear in next volume of R. I. reports.—REP.

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The journey to Canada was made, and the money was advanced, with a view of procuring to himself further prospective illegal gain through the enlistment of men to be obtained in Canada, and to be aided throughout by the influence and experience of the defendant. There must be judgment for defendant.

GAULT V. BROWN.

(48 N. H. 188.)

Contract — Entirety — Not to be performed within a year — Statute of frauds

On the 1st of January plaintiff made a parol contract with defendant to sell him all the wood upon a certain lot, at five dollars a cord, and to deliver as much thereof as he could that winter, and the balance the winter and year following, the defendant to pay on demand for amount delivered at the close of each winter's delivery. Plaintiff delivered a portion of the wood that winter, which was accepted and paid for; the remainder he delivered the winter and spring following, but defendant refused to accept or pay for it. *Held*, that the contract was entire; that the delivery and acceptance of the first part took the case out of the statute of frauds; and that it was not a contract which was not to be performed within one year from the making of it, within the meaning of the statute.

THIS was an action of assumpsit for goods sold and delivered.

The plaintiffs, on the first day of January, 1865, made a parol contract with the defendant to sell him, at five dollars a cord, all the wood that was then cut and being upon a certain lot of land, containing somewhat over seven hundred cords by estimation, and to deliver at a certain place designated, as much thereof as they could during the then present winter, and the balance thereof during the next following winter and year. The defendant agreed to pay, as often as every one hundred cords were delivered, money enough to pay for drawing; and that when plaintiffs had delivered all that they could during that winter, defendant was to pay on demand the balance due for the part delivered; and when the whole was delivered, he was to pay on demand the amount due.

The plaintiffs delivered that winter three hundred and seventy-four cords, which was accepted and paid for. The remainder was delivered during the winter and spring of 1865 and 1866, but was not

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accepted nor paid for by defendant. This action was brought to recover price. On the plaintiffs stating these facts in opening, the defendant objected that the agreement was within the statute of frauds. The case was taken from the jury and reserved for full court.

Marshall & Chase, for plaintiffs.

Foster & Sanborn, for defendant.

BELLOWS, J. The defense set up is that the contract was within the statute of frauds, and therefore invalid, both because it was for the sale of goods of the value of \$33.00 and upward, and was not to be performed in one year.

In answer to the plaintiffs' position that here was an acceptance of part of the goods sold, the defendant replies that the case shows several and distinct contracts for the sale of the lots delivered the first and second winters; and that no part of the second winter's lot was accepted.

The contract, however, was for the sale of the entire lot of wood upon a certain lot of land, estimated to be rising seven hundred cords, to be delivered that winter by the plaintiffs, at another place, so far as they could, and the balance the next winter and year; and this, we think, must be regarded as one entire contract. It was made all at one time, and embraced the entire quantity of wood, and the plaintiffs were bound to deliver it all that winter if they could, but if they could not, then to deliver it the next winter and year; the quantity delivered each winter to be paid for at the close of the winter's delivery, on demand.

There is nothing here, we think, to show separate and distinct contracts originally for the sale of different portions of this wood. It is nothing more, certainly, than a contract for the sale of goods, ten thousand bushels of wheat, for example, with a stipulation that it shall be delivered and paid for at different times; and in such a case there could be no pretense for claiming that the contract was not entire. In the case before us, it was not stipulated *absolutely* that any part of the wood should be delivered the second winter and year, but it was upon the condition, depending, perhaps, upon the sledding, that plaintiffs were unable to deliver it all that first winter.

In the case of sundry articles purchased at the same time, though

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The journey to Canada was made, and the money was advanced, with a view of procuring to himself further prospective illegal gain through the enlistment of men to be obtained in Canada, and to be aided throughout by the influence and experience of the defendant. There must be judgment for defendant.

GAULT V. BROWN.

(48 N. H. 188.)

Contract—Entirety—Not to be performed within a year—Statute of frauds

On the 1st of January plaintiff made a parol contract with defendant to sell him all the wood upon a certain lot, at five dollars a cord, and to deliver as much thereof as he could that winter, and the balance the winter and year following, the defendant to pay on demand for amount delivered at the close of each winter's delivery. Plaintiff delivered a portion of the wood that winter, which was accepted and paid for; the remainder he delivered the winter and spring following, but defendant refused to accept or pay for it. *Held*, that the contract was entire; that the delivery and acceptance of the first part took the case out of the statute of frauds; and that it was not a contract which was not to be performed within one year from the making of it, within the meaning of the statute.

THIS was an action of assumpsit for goods sold and delivered.

The plaintiffs, on the first day of January, 1865, made a parol contract with the defendant to sell him, at five dollars a cord, all the wood that was then cut and being upon a certain lot of land, containing somewhat over seven hundred cords by estimation, and to deliver at a certain place designated, as much thereof as they could during the then present winter, and the balance thereof during the next following winter and year. The defendant agreed to pay, as often as every one hundred cords were delivered, money enough to pay for drawing; and that when plaintiffs had delivered all that they could during that winter, defendant was to pay on demand the balance due for the part delivered; and when the whole was delivered, he was to pay on demand the amount due.

The plaintiffs delivered that winter three hundred and seventy-four cords, which was accepted and paid for. The remainder was delivered during the winter and spring of 1865 and 1866, but was not

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accepted nor paid for by defendant. This action was brought to recover price. On the plaintiffs stating these facts in opening, the defendant objected that the agreement was within the statute of frauds. The case was taken from the jury and reserved for full court.

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Foster & Sanborn, for defendant.

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The contract, however, was for the sale of the entire lot of wood upon a certain lot of land, estimated to be rising seven hundred cords, to be delivered that winter by the plaintiffs, at another place, so far as they could, and the balance the next winter and year; and this, we think, must be regarded as one entire contract. It was made all at one time, and embraced the entire quantity of wood, and the plaintiffs were bound to deliver it all that winter if they could, but if they could not, then to deliver it the next winter and year; the quantity delivered each winter to be paid for at the close of the winter's delivery, on demand.

There is nothing here, we think, to show separate and distinct contracts originally for the sale of different portions of this wood. It is nothing more, certainly, than a contract for the sale of goods, ten thousand bushels of wheat, for example, with a stipulation that it shall be delivered and paid for at different times; and in such a case there could be no pretense for claiming that the contract was not entire. In the case before us, it was not stipulated *absolutely* that any part of the wood should be delivered the second winter and year, but it was upon the condition, depending, perhaps, upon the sledding, that plaintiffs were unable to deliver it all that first winter.

In the case of sundry articles purchased at the same time, though

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The journey to Canada was made, and the money was advanced, with a view of procuring to himself further prospective illegal gain through the enlistment of men to be obtained in Canada, and to be aided throughout by the influence and experience of the defendant. There must be judgment for defendant.

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(48 N. H. 122.)

Contract—Entirety—Not to be performed within a year—Statute of frauds

On the 1st of January plaintiff made a parol contract with defendant to sell him all the wood upon a certain lot, at five dollars a cord, and to deliver as much thereof as he could that winter, and the balance the winter and year following, the defendant to pay on demand for amount delivered at the close of each winter's delivery. Plaintiff delivered a portion of the wood that winter, which was accepted and paid for; the remainder he delivered the winter and spring following, but defendant refused to accept or pay for it. *Held*, that the contract was entire; that the delivery and acceptance of the first part took the case out of the statute of frauds; and that it was not a contract which was not to be performed within one year from the making of it, within the meaning of the statute.

THIS was an action of assumpsit for goods sold and delivered.

The plaintiffs, on the first day of January, 1865, made a parol contract with the defendant to sell him, at five dollars a cord, all the wood that was then cut and being upon a certain lot of land, containing somewhat over seven hundred cords by estimation, and to deliver at a certain place designated, as much thereof as they could during the then present winter, and the balance thereof during the next following winter and year. The defendant agreed to pay, as often as every one hundred cords were delivered, money enough to pay for drawing; and that when plaintiffs had delivered all that they could during that winter, defendant was to pay on demand the balance due for the part delivered; and when the whole was delivered, he was to pay on demand the amount due.

The plaintiffs delivered that winter three hundred and seventy-four cords, which was accepted and paid for. The remainder was delivered during the winter and spring of 1865 and 1866, but was not

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accepted nor paid for by defendant. This action was brought to recover price. On the plaintiffs stating these facts in opening, the defendant objected that the agreement was within the statute of frauds. The case was taken from the jury and reserved for full court.

Marshall & Chase, for plaintiffs.

Foster & Sanborn, for defendant.

BELLOWS, J. The defense set up is that the contract was within the statute of frauds, and therefore invalid, both because it was for the sale of goods of the value of \$33.00 and upward, and was not to be performed in one year.

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The contract, however, was for the sale of the entire lot of wood upon a certain lot of land, estimated to be rising seven hundred cords, to be delivered that winter by the plaintiffs, at another place, so far as they could, and the balance the next winter and year; and this, we think, must be regarded as one entire contract. It was made all at one time, and embraced the entire quantity of wood, and the plaintiffs were bound to deliver it all that winter if they could, but if they could not, then to deliver it the next winter and year; the quantity delivered each winter to be paid for at the close of the winter's delivery, on demand.

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In the case of sundry articles purchased at the same time, though

for a separate price for each article, it is held that the sale is to be regarded as one entire contract for all, and not a several contract for each article. Browne on Frauds, § 335, and cases; *Baldy et al. v. Parker*, 2 B. & C. 37; *Elliott v. Thomas*, 3 M. & W. 170. So is *Gilman et al. v. Hill*, 36 N. H. 311. The same doctrine was applied where the parties made bargains for the purchase and sale of several lots of timber at different places some miles apart, the bargains being made at the different places and at separate prices, but all on the same day. Browne on Frauds, § 335, citing *Biggs v. Whisking*, 25 Eng. Law & Eq. 257.

In *Scott v. Eastern Counties Railway Co.*, 12 M. & W. 33, where goods were ordered at one time, some of which were manufactured, and others not, it was held that the contract was entire for all the goods, and that the delivery and acceptance of the manufactured articles took the case out of the statute as to all.

In the cases cited of purchases of various articles of goods at one time, but at separate prices, some stress was placed upon the fact that they were all included in one bill, tending to show that there was but one contract, which is the turning point in the inquiry.

In the case before us, we think the original contract was an entire one for the sale of the whole seven hundred cords of wood, with stipulations as to the time of delivery and payment, which in one event would defer the delivery and payment of part of the wood to the next winter.

In the last count and also in the opening of the cause, it is alleged that after plaintiffs had delivered nearly all of the three hundred and seventy-four and three-quarter cords, the defendant requested them not to deliver any more that winter; but to deliver the balance the next winter, and promised to accept the same then, according to his aforesaid contract; and thereupon the plaintiffs relaxed their efforts, and finally desisted after delivering said three hundred and seventy-four and three-quarter cords.

It was undoubtedly competent for the parties to have made at this time a new and independent contract in respect to the remainder of the wood, entirely superseding the old one. Whether they have done so or not must depend upon the evidence that may hereafter be offered. Upon the declaration and the opening of the cause we think it cannot be held that a new contract was then made superseding the old one, but rather an agreement modifying the original one as to the time of delivery of the remainder of the wood.

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The promise alleged was to accept the balance the next winter according to their aforesaid agreement, which would seem to recognize the continuance of the original contract. The case of *Cuff et al. v. Penn*, 1 M. & S. 21, was much like this in this respect. It was a written contract to deliver a quantity of bacon at different times, and after the delivery of several parcels, the parties, by parol agreed upon other times for the delivery of the rest. This was held good, and that the original contract still remained in force. See 1 Phillips' Ev. 561.

It may be remarked, however, that if the original contract had been taken out of the statute of frauds by a partial delivery and acceptance, or payment, and so had become valid and binding, it could hardly be superseded by an agreement which was invalid under that statute.

As the case now stands, we are of the opinion that the original contract of sale was an entire one for the whole quantity of wood, and that we cannot hold that it has been superseded by a new agreement as to a part. We are aware that in *Seymour v. Davis*, 2 Sandf. Sup. Ct. 239, a different doctrine was held. The contract there was for the delivery to the defendant of from five hundred to eight hundred barrels of cider during the fall and winter following, at such times and in such quantities as the plaintiffs could make it convenient to send; for which defendant was to pay \$4.00 per barrel by his indorsed note at sixty days. Several parcels were delivered and such notes given for all but the last parcel of one hundred barrels for which the suit was brought, the whole amount delivered being about two hundred and eighty barrels. The court decided, in an action to recover the price of the one hundred barrels, that the delivery and acceptance of the several shipments of cider under this agreement made so many distinct contracts of sale, upon each of which the parties had distinct remedies; and the delivery and acceptance of one or more parcels did not take the whole original agreement out of the statute; and in fact, also held, that a subsequent receipt and acceptance of part of the goods would not take out of the statute a contract for the sale and delivery of goods at a future period; that the original agreement being void could never be made valid, though subsequent acts might establish a new contract of sale embodying more or less of the original arrangement.

In respect to the doctrine that a subsequent receipt and acceptance will not take the contract of sale out of the statute, this case

is distinctly overruled in *McKnight v. Dunlop*, 1 Seld. 537, in the court of appeals; and the case of *Boutwell v. O'Keefe et al.*, 32 Barb. S. C. 434, is in direct conflict with *Seymour v. Davis*. In *Boutwell v. O'Keefe*, there was a contract to furnish the defendants with all the meal they wanted at stipulated prices, to be paid for monthly, half in cash and half in stocks, and a delivery of meal at various times. The court say that it can no longer, since the case of *McKnight v. Dunlop*, be contended that the agreement could not be made valid by subsequent part performance, or that subsequent delivery of articles from time to time in execution of the contract are to be regarded as separate and distinct transactions, or as so many separate and independent contracts.

The case of *Seymour v. Davis* goes upon the ground that a sale of goods which is invalid by the statute of frauds cannot be made valid by a subsequent delivery and acceptance of part; and therefore that when part are so delivered and accepted a new contract arises in respect to them; but it being settled that a subsequent delivery will be available, the foundation for the doctrine that a new contract is made by accepting part of the goods is taken away.

The cases cited by the court in *Seymour v. Davis* for the doctrine announced do not, we think, sustain it. In one of those cases (*Mavor v. Pyne*, 3 Bing. 285), the defendant agreed to take twenty-four numbers of a periodical work to be delivered monthly, at a guinea a number, and he took eight of them and omitted to take the rest, though ready for him. In a suit to recover the price of those received by him the plaintiff was allowed to recover, upon the ground that defendant had put an end to the contract.

In *Bowker v. Hoyt et al.*, 18 Pick. 555, another case cited, plaintiff bargained a quantity of corn to defendants and delivered a part of it, but refused to deliver the whole. In a suit for what he did deliver, it was held, that, as defendant retained the corn delivered, he was bound to pay for it, deducting the damages caused by plaintiff's failure to deliver the rest. A similar doctrine is held in *Oxendale v. Wetherell*, 9 B. & C. 386.

If part of an entire quantity bargained for is delivered and absolutely accepted, the buyer will be holden to pay for what he has so received, although the seller refuses to deliver the rest. In such case the buyer may refuse to accept part without the whole, but if he choose to retain it after the seller has declined to deliver the rest, he must pay for it, although he would be allowed to deduct the

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damages for the failure to deliver the whole. *Champion v. Short*, 1 Camp. 53; *Baker v. Sutton*, id. 55, in note.

Our conclusion is, then, that if the contract be originally entire, and it provides for the delivery of the goods at different times, and some are delivered and accepted under and in pursuance of that contract, it is no severance of it. If the vendee receive a part and then refuse to receive the rest, the vendor may maintain an action to recover the price of what is received.

The next question, then, is whether this agreement has been taken out of the statute by the delivery and acceptance of a part of the wood. The case stated is that the three hundred and seventy-four and three-fourths cords were delivered and accepted by the defendants and paid for by them according to their promise, and the only question is whether an acceptance of a part of the property sold at a time subsequent to the making of the contract is sufficient to take the case out of the statute.

By that statute no contract for the sale of goods, wares or merchandise for the price of \$33 or upwards, shall be valid "unless the buyer shall accept part of the property so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment;" or there be some note or memorandum, etc.

As will be perceived, the acceptance of part of the property at a period subsequent to the making of the contract is within the terms of the statute; and the question arises whether there is in the nature and object of this provision any thing to limit the acceptance to the time the contract is made. The object of the statute is to prevent the setting up of pretended contracts of sale to be provided by oral testimony alone, which, in the experience of mankind, often leads to perjury; but the danger is supposed to be much diminished by the actual delivery and acceptance of a part of the property sold, or the payment of part of the price. These acts have ordinarily something substantial about them to attract attention, and therefore cannot be so easily proved by false testimony as a mere oral agreement may be.

The value of these provisions as a safeguard against perjury is not at all diminished, as we can perceive, by a construction which shall give the same effect to an acceptance or part payment subsequent to the making of the contract.

A subsequent delivery and acceptance, provided it is shown to be under, and in pursuance of, the previous agreement (as it must be,

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Davis v. Eastman, 1 Allen, 422), affords the same recognition of that agreement, and the same security against fraud and false swearing, as if they were contemporaneous with the making of the contract.

Besides, in view of the great variety of cases of delivery differing as to time and circumstances, including deliveries by carriers, it would be exceedingly difficult to lay down a rule by which to determine whether such delivery and acceptance were at the time of the contract or not; and the fact that no such rule has been laid down is a strong argument against the existence of any such distinction.

In England a delivery and acceptance subsequent to the contract is held to be sufficient. In *Chaplin v. Rogers*, 1 East, 192, there was a sale of a stack of hay, and about two months after the vendee sold a part to another, who took it away, and it was held that here was an acceptance which took the case out of the statute; and this case is recognized by BELL, J., in *Shepherd v. Pressey*, 32 N. H. 56.

In *Walker v. Nassey*, 16 M. & W. 302, it is said by PARKE, B., that the "part payment" mentioned in the statute must take place either at, or subsequent to, the time when the bargain was made. See, also, *Carter et al. v. Touissaint*, 5 B. & A. 855.

In Browne on Frauds, § 337, it is said to be well established that an acceptance and receipt subsequent to the making of the bargain will take the case out of the statute. Such is the doctrine of *Marsh et al. v. Hyde*, 3 Gray, 331, after full consideration.

In *Thompson v. Alger*, 12 Met. 428, it was decided that a payment of part of the price of goods after the time when the contract was made would take a case out of the New York statute of frauds, although the provision of that statute was that there should be payment "at the time," the court saying that it was held, both in England and America, that a subsequent delivery and acceptance was sufficient. This is also the established law in New York. *Vincent v. Germand*, 11 Johns. 283; *Sprague v. Blake*, 20 Wend. 61; and *McKnight v. Dunlop*, 1 Seld. 342. In the latter case some stress is put upon the fact that the legislature struck out of the law as reported the words "at the time," which would have required the acceptance to be when the contract was made; but independently of this, the rule in New York is well established upon grounds applicable to the statute of 29 Car. II, and also to our own statute, which is substantially the same.

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In *Davis v. Moore*, 13 Me. 424, the plaintiff sold to defendant a quantity of mill logs at a price agreed. The bargain was in the forenoon, about one mile from the logs, and the buyer at the time employed the plaintiff's agent to haul a portion of the logs to defendant's mill, which he did in the afternoon of that day; *held*, that, having thus taken a part, the contract which was entire was good under the statute.

We think, then, that the contract, as the case now stands, must be regarded as entire, and that the delivery and acceptance is sufficient to take the contract out of the statute, so far as respects the provision in question.

The remaining question is, whether this contract falls within that class of contracts which are not to be performed within a year; and it becomes necessary to consider the construction given to the statute. By the revised statutes no action can be brought to charge any person upon an agreement that is not to be performed within one year from the time of making it, unless the agreement be in writing; and this is substantially like the statute of 29 Car. II, ch. 3.

In *Blandin v. Sargent*, 33 N. H. 239, it is said by BELL, J., that the authorities cited for the plaintiff have established elsewhere the rule that the statute does not apply to any contract unless, by its express terms or by reasonable construction, it is not to be performed, that is, is incapable in any event of being performed, within one year from the time it is made; and then he goes on to add: "If by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can only be done by the occurrence of some contingency by no means likely to happen, such as the death of some party or person referred to in the contract, the statute has no application, and no writing is necessary;" and it was accordingly decided that a promise by the defendant to do no more business at F., as a physician, was not within the statute, because the defendant might have died within the year, and then the promise might have been fully performed.

The principles laid down in this case are fully sustained by the authorities, and we think they are decisive of the question before us. Here the plaintiffs agreed to deliver as much of the lot of wood sold, supposed to be about seven hundred cords, as they could, that winter, and the residue, the next winter and year; and the defendants agreed to take the wood so delivered and pay for it at a certain price per cord, on demand, after each winter's delivery.

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The plaintiffs, then, were bound to deliver it all, if they could, that winter, and the defendants to take and pay for it; and we think it cannot be said as a matter of law that the wood could not all have been delivered that winter. On the contrary, it is clear that it might be; and, if so, the agreement was capable of being performed within the year. The most that can be said is that there was reason to expect there would be a balance to be delivered the next winter; but that is not enough to bring it within the statute as an agreement *not* to be performed in a year.

It is urged for the defendants that a reasonable construction of the agreement shows that the parties contemplated a longer period than one year for its performance. If by the term "contemplated," it is meant merely that the parties expected that the plaintiffs would be unable to deliver all the wood within the year, we think the defendants' position is not sustained by the authorities.

The cases, indeed, are very numerous where the parties must have expected that the agreement would not be fully performed within a year, and yet, because by the terms of the contract it might be, it is held not to be within the statute.

Such is the doctrine of *Blandin v. Sargent*, where the parties must have expected that the contract would not have been performed within a year. Among the numerous cases that maintain the same doctrine, are *Fenton v. Emblers*, 3 Burr. 1278; 1 Salk. 280, Anon.; *Peters v. Compton*, Skin. 353; 1 Com. on Con. 86; *Souch v. Strawbridge*, 2 M. G. & S. 808; *Hinckley v. Southgate*, 11 Vt. 430; *Artcher v. Zeh*, 5 Hill, 200.

Case discharged.

PITKIN v. NOYES.

(48 N. H. 294.)

Contract by parol—Statute of fraud—Sale of crop to be raised—Consideration.

Plaintiff made a parol contract with defendant, whereby the latter was to raise three acres of potatoes and deliver them to plaintiff at a stipulated price per bushel. In an action for non-delivery, *held*, that it was a question for the jury to determine, whether, under the contract, the defendant was

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bound to raise the potatoes himself, in which case it would be a contract for work, labor and materials, and not within the statute of frauds; or whether he might procure them by purchase or otherwise, which would render it a contract of sale, and therefore void.

The compromise of a doubtful and conflicting claim is a good consideration for a new agreement.

ACTION of assumpsit.

In the spring of 1863 plaintiff and defendant made a verbal agreement, whereby the defendant was to raise, that year, three acres of potatoes, and deliver them to the plaintiff at twenty cents per bushel; and there was some evidence, which was disputed, that the contract was to include the year 1864. The defendant raised and delivered the three acres in 1863, when the plaintiff refused to pay over eighteen cents per bushel, claiming that the contract was not legal, not being in writing. The plaintiff finally agreed to pay the twenty cents per bushel, provided the defendant would agree to raise and deliver three acres of potatoes at the same price in 1864. This bargain was concluded in January, 1864. This action was brought for a non-delivery of the potatoes of 1864.

The jury disagreed, and the case was reserved for the purpose of having the questions of law settled.

Ladd, for plaintiff.

Ray, for defendant.

BELLOWS, J. If the bargain in the spring of 1863 was for the potatoes of that year, and also for the year 1864, it would be within the statute of frauds, as to the potatoes of the last year, at least, as an agreement not to be performed in one year. *Emery v. Smith*, 46 N. H. 151. The question, then, is, whether a valid agreement for the crop of 1864 was made in January of that year; and we propose to inquire, in the first place, whether such a contract as is stated in the testimony of the plaintiff is to be regarded as a contract for work, labor and materials, or a contract of sale of the crop of potatoes. If the former, it is not within the statute of frauds, but if the latter, it is.

It is manifest, from the nature of the case, that it must be very difficult to draw a line of distinction between these two classes of contracts. In some instances the distinctions must be very nice, and

it is to be expected that we should find the authorities not altogether harmonious.

It is now settled, however, that a contract for the sale of goods is not without the statute because it is executory, and it is well settled that a contract for work and labor and materials found is not within the statute.

In the early English cases it was held, that a contract for the sale of articles to be afterward manufactured and delivered was not within the statute; as in *Towns v. Osborne*, 1 Str. 506, where defendant bespoke a chariot; and so of a contract to deliver wheat not then threshed, as in *Clayton v. Andrews*, 4 Burr. 2101. In both of these cases the decision went upon the ground that the contract was executory. But these cases were soon after qualified by decisions holding that contracts of sale, though executory, were within the statute (*Rondeau v. Wyatt*, 2 H. Blk. 63, and *Cooper v. Elston*, 7 T. R. 14); and yet the results reached in *Towns v. Osborne* and *Clayton v. Andrews* have been in some cases recognized as correct, although upon a different ground, namely, that the articles were not existing at the time of the bargain, and so incapable of delivery and acceptance; as in *Graves v. Buck*, 3 M. & L. 178; 2 Starkie Ev. 608, and cases cited in note C.

But in *Garbut v. Watson*, 5 B. & Ald. 613, it was held that a contract to sell one hundred sacks of flour at a price fixed, to be ready in three weeks, was within the statute, though the flour was not then ground.

Of the same character is *Smith v. Surnam*, 9 B. & C. 561, where it was decided that a bargain for certain timber trees growing on the owner's land, at a fixed price per foot, was a contract for the sale of goods, and within the statute, although to be cut afterward by the seller; holding that when cutting them he was doing work for himself and not for the buyer. LITTLEDALE, J., holds that where the contracting parties contemplate a sale of goods, although at the time of making the contract the subject-matter does not exist as goods, but is to be converted into that state by the seller's bestowing work and labor on his own raw materials, that is a case within the statute; and he says further that it is sufficient if, at the completion of the contract, the subject-matter be goods, wares and merchandise; and PARKER, J., says, the true question in such cases is whether the contract be substantially a contract for the sale of goods or for work and labor and materials found.

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These two last cases modify materially the doctrine of *Graves v. Buck*, and the earlier cases of *Towns v. Osborne* and *Clayton v. Andrews*, and hold that it is not essential that the goods be capable of delivery at the making of the contract to bring it within the statute. So the fact that the goods are to be transported to another place, and there delivered, does not take the case out of the statute. *Kent v. Hutchinson*, 3 B. & P. 233, and *Astry v. Emery*, 4 M. & S. 262.

The weight of American authority is in accordance with the doctrine of *Garbut v. Watson*, 5 B. & Ald. 613, and *Smith v. Surnam*, 9 B. & C. 561, that the mere fact that the goods are not, at the making of the contract, in the condition in which they are to be when delivered does not take case out of the statute.

If, however, a person contract to manufacture and deliver at a future time certain goods, at prices then fixed, or at reasonable prices, the essence of the agreement being that he will bestow his own labor and skill upon the manufacture, it is held not to be within the statute. If, on the other hand, the bargain be to deliver goods of a certain description at a future time, and they are not existing at the time of the contract, but the seller does not stipulate to manufacture them himself or procure a particular person to do so, the contract is within the statute. The distinction is, that in the one case the party stipulates that he will himself manufacture the article, and the buyer has the right to require him to do it, and cannot be compelled to take one as good, or even better, if made by another; while, in the other case, the seller only agrees to sell and deliver the article, and is under no obligation to make it himself, but may purchase it of another.

This is the doctrine laid down by SHEPLEY, J., in *Hight v. Ripley et al.*, 19 Me. 137, where the distinction between the cases is well explained, and the doctrine has since been followed by the Maine courts. *Abbott v. Gilchrist et al.*, 38 Me. 260; *Peckett v. Swift*. 41 id. 68; and *Edwards v. Grand Trunk Railway*, 48 id. 379. This doctrine of *Hight v. Ripley* is recognized as sound by Professor Parsons in his work on contracts, vol. 2, 334, where, in a note, the authorities are collected.

This distinction is also recognized in Massachusetts. In *Gardner et al. v. Joy*, 9 Met. 179, SHAW, C. J., lays it down thus: "If it is a contract to sell and deliver goods, whether they are then completed or not, it is within the statute. But if it is a contract to

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make and deliver an article or quantity of goods, it is not within the statute." Here the contract was for one hundred boxes of candles by a manufacturer, and, although the candles were not then made, it was held that the contract was within the statute, there being no stipulation by the manufacturer to make them.

In *Mixer v. Howarth*, 21 Pick. 205, it was held that an agreement by defendant to build a carriage for the plaintiff, or to finish one for him from materials partly wrought, was not within the statute, it being held by SHAW, C. J., that a contract to sell an article then existing, or which the vendor usually has for sale in the course of his business, is within the statute; but it is otherwise if the agreement by a workman be to put materials together and construct an article for the employer, whether at an agreed price or not.

The same general doctrine is recognized in *Spencer v. Cone et al.*, 1 Met. 283, holding that an agreement to make certain machines for another at a specified price is not within the statute, but an agreement for labor and materials. The distinction is also recognized in *Waterman v. Meigs et al.*, 4 Cush. 499, and in *Lamb v. Crafts*, 12 Met. 356.

In New York the distinction is fully recognized between an agreement for the sale and delivery at a future day of articles then existing, and an agreement to sell and deliver articles not thus manufactured, but to be made afterward, holding that the latter are contracts for work and labor and materials found, and not within the statute; but the New York cases do not appear to mark the difference between the contract of a party to manufacture and deliver an article and his contract to deliver it merely, whether made by himself or another. A contract of sale, though executory, is held to be within the statute. *Bennett v. Hall*, 10 Johns. 363; *Jackson v. Covert*, 5 Wend. 141.

The cases that hold that a contract to make an article is not within the statute are *Crookshank v. Burrill*, 18 Johns. 57, which was an agreement to make the wood-work of a wagon; *Sewall v. Fitch*, 8 Cow. 215, which was a contract for nails of a particular manufacture, but not then made; *Robertson v. Vaughn*, 5 Sanf. 1, which was a contract to make and deliver one thousand molasses shoofs at a fixed price, which was decided not to be within the statute upon the authority of *Sewall v. Fitch*. DUER, J., who gave the opinion, thought the case to be within the mischiefs of the statute, and was disposed to question the earlier cases.

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So is *Brown v. Winan*, 10 Barb. 406, where it was held that a contract for flour to be ground from wheat, bargained for, but not then received, is not within the statute.

So in *Donovan v. Wilson*, 26 Barb. 138, there was a contract to deliver at a future day an article to be manufactured by defendant, and it was held not to be within the statute.

So is *Parker v. Schenck*, 28 Barb. 30, and *Mead v. Case*, 33 id. 202, where the agreement was to finish a monument, with the inscription, and deliver it to the other party.

In most of the cases the party himself agreed to manufacture the goods, and that would bring them within the doctrine of *Hight v. Ripley*, 19 Mass. 137, before cited, although the distinction does not seem to be adverted to.

In *Downs v. Ross*, 23 Wend. 270, a contract for the sale of seven hundred bushels of wheat, part of which was yet to be threshed and the rest to be cleaned more thoroughly, and all to be delivered in six days, at a price fixed, was held to be a contract for the sale of goods, and within the statute; COWEN, J., dissenting, upon the ground that the question was settled by the early English and New York cases, but saying that were it an open question he would not deny that a contract to manufacture and sell would more correctly be considered a sale within the statute. This case falls within the principle of *Garbut v. Watson*, 5 B. & Ald. 613, and *Smith v. Surnam*, 9 B. & C. 561, before cited, where something was to be done by the seller to perfect the goods before delivery.

In Connecticut it was held that an agreement to deliver to a party one hundred sewing machines of a certain description, at a time and place designated, on condition that a part of them not then completed were finished in season by a third person who worked in seller's shop, and with his materials, was a contract of sale, and not for the manufacture of the machines; but even if it were otherwise as to the part not completed, sixty-four in number, still, as the contract was entire, and as it was clear that in respect to the thirty-six it was a sale, the whole, it was said, must be regarded as within the statute. *Atwater v. Hough*, 29 Conn. 508.

In *Phips v. McFarlane*, 3 Minn. 109, there was an agreement to furnish materials and fit them for a steam mill, which was portable, and it was held that it was not a contract of sale; but it blends together the price of the thing, and compensation for work and labor and materials, and is not within the statute.

In our own courts, in *Gilman et al. v. Hill*, 36 N. H. 311, where there was a contract made in August to sell to the plaintiff all the sheep pelts taken off by the seller, who was a butcher, between the 1st of July and the 1st of October, it was held that in respect to all, as well those not then taken off as those that were ready for delivery, it was a contract of sale of goods, and not for work and labor, and was within the statute.

In 2 Kent's Commentaries, 504, 511, note *b*, the earlier English doctrine is recognized, that if the article sold existed at the time *in solido*, and was capable of delivery, the contract was within the statute; but otherwise if it was to be afterward manufactured or prepared for delivery by work and labor.

And much the same is Story on Contracts, section 787 and note. In Browne on Frauds, this subject is well considered, and the conclusion reached is expressed in section 308, that, if the contract be essentially a contract for the article manufactured or to be manufactured, the statute applies to it; but, if it is for the manufacture for the work, labor and skill to be bestowed in producing the article, the statute does not apply.

Upon the whole, we are satisfied that if the contract be substantially for the goods, it is within the statute whether they are then manufactured or not; but it is otherwise if the contract be to manufacture and deliver the goods, that is, if the labor and skill of the seller are stipulated for, and make part of the contract.

It is quite obvious that the labor and skill of a workman may be bargained for in this way as well as in any other, his compensation being in the price of the article he makes; and the only question in the particular case is whether the skill and labor of that workman were especially contracted for, so that the employer was entitled to that, and could be obliged to take no other.

In many cases, then, there could be no difficulty in determining whether the labor and skill of the particular person were of the essence of the contract, or whether they were, in the contemplation of the parties, substantially a sale.

If an artist contract to paint the portrait of another, although he is to find the canvas and paints, it would readily be conceded that the substance of the contract was for the skill and labor of the particular artist. So, if a printer contract to print a book for an author, though he is to furnish the paper and ink, as held in *Clay v. Gates*, 1 H. & N. 73. So, if a carpenter agree to erect a building

for another upon his land, and find all the materials, it is a contract for work and labor and materials. *Courtright v. Stewart*, 19 Barb. 455. So it would be if a person carry cloth to a tailor who agrees to make a coat for him, even if the tailor is to find the trimmings.

The contract may be for work and labor simply, for work and labor and materials, or for the sale and delivery of goods, wares and merchandise. In respect to the two last, the line of separation must often be indistinct and difficult to trace; and we are not able to discover any established rule or criterion by which to distinguish them readily.

The rule established in New York, namely, that if the goods contracted for are not then in existence, but are still to be manufactured, it is to be considered as a contract for work and labor, originated at an early period, in a disposition of the English courts to limit the operation of the statute of frauds, and must obviously exclude from the operation of that statute a large class of cases that are within its mischiefs, and at the same time are, in substance, contracts of sale.

On the other hand, the doctrine of LITTLEDALE, J., in *Smith v. Surnam*, 9 B. & C. 561, is, that if the parties contemplate a sale of goods, although the subject-matter at the time of making the contract does not exist in goods, but is to be converted into that state by the seller bestowing work and labor on his own raw materials, it is a case within the statute—holding that it is sufficient, if, at the time of the completion of the contract, the subject-matter be goods, wares and merchandise; and this general doctrine seems to be recognized in *Watts v. Friend*, 10 B. & C. 446, per LORD TENTERDEN. So in *Ellis, Best & Smith*, Excheq. Rep., 272 (23 U. S. Dig. 277), it was held that a contract to make a set of artificial teeth, and fit them to the mouth of the other party, who died before they were completed, was a contract for the sale of goods, and within the statute.

This doctrine of LITTLEDALE, J., brings us round to the question whether, in the contemplation of the parties, the contract was substantially a contract for the sale of goods, or for work and labor.

In Massachusetts a distinction is made between a contract for the sale and delivery of articles which the seller is habitually making, and a contract to make an article pursuant to the agreement, the former being regarded as a contract of sale, but the latter not. *Lamb v. Crafts*, 12 Met. 353. This must be because it was supposed

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to bear on the question whether the stipulation that the party himself should make the goods was of the essence of the contract, and so a contract for work and labor.

As a rule of law, however, it does not strike us as affording a very satisfactory distinction between a contract of sale and a contract for work, labor and materials. If it be of the substance of the contract that the manufacturer shall himself apply his own labor and skill to the manufacture of the goods for the buyer, who is not bound to receive any other, it can make no difference whether the goods are habitually made by such manufacturer or not. If he does habitually make such goods for sale, he may nevertheless contract to bestow his own labor and skill in making them for a particular person, and the real inquiry is whether, in a given instance, he has done so or not.

In the absence of explicit and distinct terms, the circumstances may be such as to indicate clearly that the labor and skill of the particular artist were especially stipulated for, as in the case of an agreement to paint a portrait, to execute a marble statue or any other work of high art. In such cases, and especially where the materials used in the work are of slight importance compared with the labor and skill of the artist, it might well be supposed that the skill and labor were of the essence of the contract, and such seems to have been the opinion of POLLOCK, C. B., in *Clay v. Gates*, 1 H. & N. 73, before cited.

On the other hand, if the contract be for goods which are usually in the market, and there is nothing in the terms used or in the nature of the case to indicate that the labor and skill of the contractor were stipulated for especially, it must be deemed a contract of sale, and within the statute.

If the article to be manufactured or the crop to be raised is not a marketable commodity, but of value chiefly to the one who contracts for it, that circumstance has been supposed to indicate that the labor and skill of the other were bargained for. Browne on Statute of Frauds, § 308, citing *Cason v. Cheely*, 6 Geo. 554, which is based upon such a distinction. Whether such a distinction, as a rule of law, is well founded or not, it certainly presents a strong equity in favor of holding such cases as not to be within the statute.

In the case before us the question is whether the essence of the contract was a sale of the expected crop of potatoes at twenty cents a bushel, or a stipulation for defendant's work and labor and mate-

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rials in producing them. The proof is of an agreement by defendant to raise three acres of potatoes in 1864, and deliver them at the plaintiff's mill at twenty cents the bushel; was it, then, an essential part of the contract that the defendant should himself raise the potatoes? If it was, it would seem from the principles stated that the contract cannot be regarded as a sale.

In the case of *Gardner et al. v. Joy*, 9 Met. 177, the plaintiffs inquired of the defendant what he would take for sperm candles, and, upon being told, said they would take one hundred boxes, which was assented to; defendant who was a manufacturer then said they were not then manufactured, but he should or would manufacture and deliver them in the course of the summer. The court held this to be a contract for the sale of goods within the statute; and that what was said as to the subsequent manufacture had reference only to the time of delivery, and that the delivery of good merchantable candles of another person's manufacture would have been a compliance with the contract.

In the case before us was the defendant bound himself to raise three acres of potatoes, or only to deliver good merchantable potatoes in quantity equal to the ordinary product of three acres? Or, in other words, was the stipulation in respect to the three acres introduced only to determine the quantity to be delivered, and not to oblige the defendant to raise them?

It is obvious that the plaintiffs might have an interest in stipulating that defendant should himself raise the potatoes, and as the terms of the contract are explicit that he should do so, we cannot be justified, as the evidence now stands, in holding that this is not an essential part of the agreement.

We are aware of the case of *Watts v. Friend*, 10 B. & C. 446, before cited. There A. agreed to supply B. with a quantity of turnip seed, and B. agreed to sow it upon his own land and sell the crop to A. at £1, 1s. per bushel, and it was held, that in good common sense this must be considered as substantially a contract for goods and chattels, for the thing agreed to be delivered would at the time of delivery be a personal chattel.

The reason assigned here for this decision would apply to all cases where the labor and materials employed were to result in goods and chattels, the price of which was to be the measure of compensation, and, without regard to the question whether in the contemplation of the parties labor and skill were especially contracted for or not, and

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for the reasons already suggested, we are not prepared to assent to that view.

Upon the whole our conclusion on this point is, that, as the question is a mixed one of law and fact, it will be proper to leave it to the jury, in view of all the circumstances of the case, to find whether the contract was essentially for the work and labor and materials of the defendant in raising the potatoes, so that he was bound himself to raise them; or whether it was substantially a sale of potatoes, which he might raise himself, or procure by purchase or otherwise. If it was the former, it would not be within the statute of frauds; but if the latter, it would be.

Another question raised is in regard to the consideration for defendant's agreement. If the plaintiffs agreed to take and pay for the crop of potatoes at the price fixed, that of course would be a sufficient consideration. We are of the opinion, also, that the compromise of doubtful and conflicting claims is a good and sufficient consideration to uphold an agreement. 1 Parsons on Con. 364; Chitty on Con. § 42, and note 1 and cases; *Longridge v. Dowille*, 5 B. & Ald. 117; *Crowther et al. v. Farrer*, 15 A. & E. (N. S.), Q. B. 677; *Barlow v. Ocean Ins. Co.*, 4 Met. 270; *Tuttle v. Tuttle*, 12 id. 551; *Crans v. Hunter*, 28 N. Y. 389; *Gates v. Shatts*, 7 Mich. 127; *Union Bank of Georgetown v. Geary*, 5 Pet. 99; *Fleming v. Ramsay*, 46 Penn. St. 252; *Parker v. Way*, 15 N. H. 45; *Burnham v. Dunn*, 35 id. 560.

The law indeed highly favors the compromise of doubtful claims; but the surrender or discharge of a claim, which is utterly without foundation and known to be so, is not a good consideration for a promise (*Kidder v. Blake*, 45 N. H. 330, and cases cited); but is otherwise if the claims are doubtful and so understood by the parties, and in such a case the consideration will not be defeated by showing that in fact no valid claim really existed.

In the case before us it does not appear that there was any doubt about the contract for the first year, and if not, an agreement to perform it would be no valid consideration for a new promise. What the evidence on that point was, however, we do not know, and the only question here is as to the law in such cases.

Case discharged.

Taylor v. Grand Trunk Railway Company.

TAYLOR V. GRAND TRUNK RAILWAY COMPANY, appellants.

(48 N. H. 304.)

Carriers of passengers — Degree of care — Exemplary damages.

Carriers of passengers by railroad are bound to exercise the highest degree of care and diligence in the conduct of their business, and are responsible for the smallest negligence.

In an action against a railroad company to recover for injuries sustained by an accident, the court charged the jury that "defendants must use such degree of care as is practicable short of incurring an expense which would render it altogether impossible to conduct the business." *Held*, to be erroneous, as making the ability of the corporation the measure of the care and diligence required. While, as a rule, railroad corporations are not bound to exercise such a degree of care as would render it practically impossible to continue this mode of transportation, yet the standard of care and diligence for a particular railroad cannot be made to depend upon its pecuniary condition. It is bound to provide all the agencies suited to the nature and extent of the business it purposes to do, irrespective of any fluctuation in its revenue. *Held*, further, that a charge to the jury, that if they found that the accident was caused by the gross negligence of defendants, they might in their discretion give exemplary damages, was correct.

THIS was an action brought to recover damages sustained by reason of an accident on defendants' road. The accident was caused by the breaking of a rail, and evidence was introduced by the plaintiff to show that the track was very much curved at the point of the accident; that the rail which broke was very much worn and battered, and not suitable for use. The defendants' evidence tended to show that the breaking was caused by a hidden defect in the rail, which it lay beyond their power to detect.

The court charged the jury in substance, that the burden of proving defendants' negligence was on the plaintiff; that the defendants were not insurers, but were liable for the smallest negligence; that they were bound to use the highest degree of care and diligence, or such a degree as is practicable short of incurring an expense which would render it altogether impossible to continue the business; and that if they found that the accident was caused by the gross negligence of defendants, the jury might if they chose give exemplary damages, but that they were not bound to do so.

The jury were requested in case they gave exemplary damages, to assess the compensatory and exemplary damages separately.

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The jury found for plaintiff, and assessed the compensatory damages at \$500, and the exemplary damages at \$858.50. Defendants appealed.

Ray & Ladd, Widden & Heywood, for plaintiff.

Fletcher & Bingham, for defendants.

BELLOWS, J., (after deciding some questions of practice).

The great question in the case is upon the instructions to the jury in respect to the duty of the defendants; the court having apparently answered that the carriers of passengers by railroad are bound to exercise the highest degree of care and diligence in the conduct of their business, and that they are responsible for the smallest negligence.

Upon a careful examination of the authorities we think this general view of the duties of such carriers, taken in the charge, is correct. It is applicable, indeed, to the carriers of passengers by stage coaches, where the rate of speed is not much above six miles the hour, and it is very obvious that a higher degree of care and skill is demanded in the transportation of passengers by steam upon a railroad, where the speed is so much greater.

In the English courts the proprietors of stage coaches are held to a high degree of care and skill. In *Aston v. Heaven et al.*, 2 Esp. 533, it was said, per EYRE, C. J., that the driver was answerable for the *smallest negligence*. In *Christie v. Greggs*, 2 Camp. 79, it was held that the undertaking of the carrier of passengers went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance.

In *Crofts v. Waterhouse*, 3 Bing. 319, BEST, C. J., lays it down that the coachmen must have competent skill, and must use that skill with diligence, must know the road, have steady horses, and a sufficient coach and harnesses; and if there be the least failure in any one of these things the duty of the coach proprietor is not fulfilled, and he is answerable for any injury or damage that may happen.

In *Sharp v. Gray*, 9 Bing. 457, the case was that the axle-tree broke in consequence of a defect in the iron, and it was left to the jury to determine whether there had been the vigilance in examining the axle-tree, which was required by the engagement to carry the plaintiff safely, although from the language of the judges it

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seems to have been understood that the carrier was bound absolutely to see that his coach was road-worthy.

In *Brenner v. Williams*, 1 C. & P. 414, it was held by BEST, C. J., that every coach proprietor warrants to the public that his stage coach is equal to the journey it undertakes, and that it is his duty to examine it previous to the commencement of every journey. See also *Israel v. Clark et al.*, 4 Esp. 259, and 1 Starkie, 423.

The doctrine of the American courts is still more strict and explicit; and the general current of the authorities is, that the carrier of passengers is bound to the utmost care and diligence of very cautious persons, and is responsible for any, even the smallest, neglect, holding their undertaking to be to carry their passengers with safety, as far as human care and foresight can go. This is distinctly laid down in Story on Bail. § 601, 601 *a*, and also in 2 Greenl. Ev. § 221, and in 2 Kent's Com. *601, *602, and Redfield on Rail. chap. 17.

This, it will be perceived, accords substantially with the definition of the highest degree of care required of bailees of goods, namely, that care and diligence which very prudent persons take of their own concerns. Story on Bail. § 16; Jones on Bail. 166, where it is said that slight neglect is the omission of that diligence which very circumspect and thoughtful persons use in securing their own goods and chattels.

It is true that doubts have often been expressed as to the utility of the theory which undertakes to define the degrees of negligence as slight, ordinary and gross, as in *Steamboat New World v. King*, 16 How. (U. S.) 474, and cases cited, where CURTIS, J., expresses the opinion that the attempt thus to define the degrees of negligence had better be abandoned. So it is in *Briggs v. Taylor*, 28 Vt. 184.

But however this may be, some light may be gained in respect to the duty of carriers of passengers by steam, by considering some of the rules which have governed the courts in relation to bailments.

When the contract of bailment is mutually beneficial to both parties, as in the case of bailments for hire, pledges and the like. the bailee has been held for ordinary care, which is defined to be that care which every person of common prudence and capable of governing a family takes of his own concerns (Jones on Bail. § 11; Story on Bail. § 11); while a bailee who alone receives a benefit, as in the case of the borrower, is bound to use extraordinary care.

In the case of the bailee of goods, the obligation of care and dili-

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gence rises in proportion to the demand for it, although it still is only ordinary diligence that is required; but it is obvious that what will constitute ordinary care will be affected by the nature, bulk and value of the goods bailed, for no one would expect the same care to be taken of a bale of cotton as of a box of jewelry or other thing peculiarly liable to be stolen or injured.

The case of common carriers of goods is an exception to the general rules applicable to bailments, and they are now regarded as insurers, and liable for all losses except such as are caused by the act of God or by the public enemies; and this is put upon the ground of public policy to guard against both negligence and collusion *Moses v. Boston & Maine Railroad*, 24 N. H. 84.

Upon grounds of public policy, also, the carrier of passengers is bound to exercise the highest degree of care and diligence. To his diligence and fidelity are intrusted the lives and safety of large numbers of human beings. He assumes the trust voluntarily, and for it receives a sufficient compensation; and we think it very apparent that in no case of the bailment of goods is there so great and imperative a demand for the utmost skill and diligence as from the carrier of passengers. Especially is this true when the passengers are carried upon railroads by steam, for then, in consequence of the greater speed, the hazards to life and limb are largely increased.

In *The Philadelphia & Reading Railway Co. v. Derby*, 14 How. (U. S.) 486, the court says: "When carriers undertake to convey persons by the powerful, but dangerous, agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence; and whether the consideration be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of gross." And this statement is emphatically indorsed in the case of the *Steamboat New World v. King*, 16 How. (U. S.) 474, as resting not only on public policy, but on sound principles of law.

In Redfield on Rail., § 149, note 5, the author says: "If the degree of care and watchfulness is to be in proportion to the importance of the business and the degree of peril incurred, it is scarcely possible to express the extreme severity of care and diligence which should be required in the conduct of passenger trains upon railways."

So in *Hegeman v. Western R. R. Co.*, 3 Kern. 9, it is held that the

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same precautions required in running a stage coach at the rate of six miles the hour would not be the test for a railroad car running thirty or forty miles the hour; and a similar view is adopted in 1 Smith's Lead. Cas. (5th Am. ed.) 328; note to *Coggs v. Bernard*.

The measure of the care and diligence required of carriers of passengers, as laid down in Story on Bailments, Greenleaf's Evidence, Kent's Commentaries, and Redfield on Railways, as before cited, is fully sustained by the American cases.

In *Stokes v. Saltonstall*, 13 Pet. (U. S.) 181, the instructions to the jury were, that it was incumbent on the defendant to prove that, in managing the coach, the driver acted with reasonable skill and with the utmost prudence and caution, and that, if the injury was occasioned by the least negligence or want of skill or prudence on his part, the defendant was liable; and on error these instructions were held to be correct, the court saying that the undertaking is that, as far as human care and foresight can go, the carrier will transport the passengers safely.

In Massachusetts it is held that carriers of passengers are bound to use the utmost care and diligence to prevent the injury which human foresight can guard against (*Ingalls v. Bills*, 9 Met. 1); where it is said that the carrier is responsible for defects that might have been discovered upon the most careful and thorough examination. In *McElroy and wife v. Nashua & Lowell R. R.*, 4 Cush. 400, it was held that the defendants were bound to the utmost exact care and diligence, not only in the management of the trains and cars but also in the structure and care of the track, and in all the subsidiary arrangements necessary to the safety of the passengers. In Maine the carrier is held for such care as is used by very cautious persons. *Edwards v. Lord*, 49 Me. 279.

In Connecticut the carrier is held for the highest degree of care of a reasonable man. *Hall v. Conn. River Steamboat Co.*, 13 Conn. 320; *Derwent and wife v. Loomer*, 21 id. 253; *Fuller v. Naugatuck R. R.*, id. 557, 576. In *Hadley and wife v. Cross*, 34 Vt. 586, the doctrine of *Ingalls v. Bills* was applied to a livery stable keeper letting a defective carriage, namely, that he was liable if the defect could have been discovered upon the most careful and thorough examination. So in New York (in *Hegeman v. Western R. R.*, 16 Barb. 353), it is held that the carrier is bound to conduct his business with all the care which human prudence and skill could suggest; and the defendants were held liable for injuries caused by

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a defect in a car made by a competent manufacturer, which defect was not discoverable upon a thorough examination after the car was finished, but might have been before, by bending the axle in which the defect was, and thus holding the carriers liable for the neglect of the manufacturer, and this decision was affirmed in 3 Kern. 9. In *Caldwell v. Murphy*, 1 Duer, 241, the charge of the judge that the law exacted of the carriers of passengers extraordinary care and diligence, and that they were liable for any injury unless it happened from pure accident, was held to be entirely correct, and that extreme care was required. In *Camden & Amboy R. R. v. Burke*, 13 Wend. 626, the court recognize the rule that the carrier is bound for the utmost care of very cautious persons.

In *Railroad Co. v. Aspell*, 23 Penn. 147, it was held, that a railroad was bound to exercise the strictest vigilance, and must carry their passengers safely, if human care and foresight can do it, and they are liable for any defect in the road, the cars or the engines, or any other species of negligence whatever of which they or their agents may be guilty. So is *N. J. Railroad Co. v. Kennard*, 21 Penn. 203.

In *Galena & Chicago R. R. v. Yarwood*, 15 Ill. 468, it is said that the current of authorities both in England and America is uniform in holding these carriers to the utmost prudence and caution; holding them liable for the slightest negligence, and that the diligence of cautious persons is not enough.

In *Galena & Chicago R. R. v. Fay*, 16 Ill. 558, it is held, that the highest degree of care, vigilance and skill are required, and that the carrier is responsible for the least neglect known to the law, short of insurance. In *Frink v. Potter*, 17 Ill. 406, it was held that carriers of passengers are liable for slight neglect, and that the law imposes upon them the duty of carrying their passengers safely, so far as is reasonably practicable, and that they would be liable for injury by the breaking of an axle by reason of frost, if by extraordinary care and attention the danger might have been avoided. Similar views are also maintained in *Frink v. Coe*, 4 Greene (Iowa), 555, and in *Fairchild v. California Stage Co.*, 13 Cal. 599.

In *Kenny v. Neil*, 1 McL. 540, it was held, that a passenger carrier was not liable for casualties which human sagacity could not foresee, and against which the utmost prudence cannot guard; that the driver is bound to exercise the utmost care and must be skillful, and that the employer is responsible for the least degree of imprudence and want of care in the driver; and much the same is *Marcy*

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v. *Tallmage*, 2 McL. 157, holding that the carrier is bound to carry his passengers safely, as far as human skill can accomplish that object, and is chargeable for the least negligence or want of skill or prudence.

In our own state it is said, per EASTMAN, J., that railroads as carriers of passengers are liable for all damages that may arise to them from even the smallest negligence on their part, or that of their servants. *Cornwall v. The Sullivan R. R.*, 28 N. H. 159. A similar statement is made in *Clark v. Barrington*, 41 id. 51.

The authorities cited fully sustain the general view taken by the judge in his instructions to the jury, and the question is whether in the illustrations given there was any thing calculated to mislead them. The objection most urged is the statement that defendants must use such a degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business.

This is substantially the language of Judge Redfield in 2 Railways (3d ed.), 137, and is apparently based upon the idea that the rule calling for the utmost degree of care, vigilance and precaution must be understood, not to require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render it impracticable. This is the doctrine of *Tuller v. Talbot*, 23 Ill. 357, where it is also said that this rule does not require the utmost degree of care which the human mind is capable of inventing, as such a rule would involve the expenditure of money, and the employment of hands so as to render it perfectly safe, and would prevent all persons of ordinary prudence from engaging in that kind of business. But the rule *does* require that the highest degree of practicable care and diligence should be used that is consistent with the mode of transportation adopted.

To the general views thus expressed we perceive no objection. Indeed, it is quite manifest, we think, that in fixing upon a measure of the obligation of common carriers by railway to the traveling public, it is proper to consider how far it is reasonably practicable for them to go in view of the expenditures that might be required; and, looking at the subject as a whole, we think it could never have been intended to fix upon a measure of care that would render it practically impossible to continue this mode of transportation.

At the same time the standard of care and diligence for a particular railroad cannot be made to depend upon its pecuniary condi-

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tion, or the amount of its earnings; but having undertaken to carry passengers in that mode, its duty is to provide a track, rolling stock and all other agencies suited to the nature and extent of the business it proposes to do; and the measure of its care and diligence is not to fluctuate with the changes in its revenues. A direction to the jury, therefore, that should make the degree of care required turn upon the pecuniary means of this particular road would be erroneous.

The part of the charge particularly objected to is the direction that "defendants must use such degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business."

This might, and probably would, be understood to require of the defendants all practicable care to the extent of their means, which would make the ability of the corporation the measure of the care and diligence required, and *that* obviously is not the true test—and judging from other parts of the instructions it was not so intended—still the terms used are so explicit that there is reason to fear that the jury may have been misled, and induced to require as a standard a higher degree of care and diligence than the law actually demands. It would be quite likely to be so, if it appeared that the corporation was receiving a large income from this business beyond the expenses. If, on the other hand, it appeared that the receipts did not equal the running expenses, the jury might feel at liberty to exact a lower degree of care and diligence.

In respect to common highways it has been decided in this state that the standard by which their sufficiency is to be tested is not to be expanded or contracted by the wealth or poverty of the town (*Winship v. Enfield*, 42 N. H. 197, 208); and we think the same rule is applicable to the proprietors of railroads. They are bound to keep them in suitable repair, and to operate them with suitable care and diligence, considering the character and extent of the use to which they are applied.

As before remarked, the passage under consideration is in terms much like the passage in 2 Redfield on Railways, 187; but upon a close examination of his statement it will not be found that the author intended to announce the doctrine that the degree of diligence was to be measured by the revenues of the particular railroad, but that in fixing a general standard of care and diligence there should not

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be so much required as to render this mode of conveyance impracticable.

The objection to the passage in question now before us is, the danger that the jury may have understood that the defendants were bound to use all practicable care and skill to the extent of their means; and as we do not know that their means were not understood to be ample, we cannot be sure that the jury were not misled.

The jury in this case have found that there was gross negligence, and it might, perhaps, be urged that this finding shows that no harm was done by the instructions in question. We think, however, that, in determining what was gross negligence, the jury would naturally and properly be influenced by the degree of care and diligence which they supposed the law required; and if that standard was carried too high they might also come to a wrong conclusion as to what was gross negligence. We, therefore, are constrained to hold that in respect to the particular direction under consideration, the charge was erroneous.

It is urged, also, that there was error in the direction that defendants were bound to the utmost care and prudence of a very cautious person; but we think there was no error in this. It is not only in accordance with the doctrine of the elementary books, but is sustained, as we have seen, by the general current of adjudged cases.

It is true that the terms used do not furnish an exact measure of the care required, but that difficulty is inherent in the nature of the subject. It has, however, this advantage, that it conforms substantially to the ordinary definition of the highest degree of care required of bailees of goods, and has therefore the sanction of long use.

In respect to exemplary damages, we consider the law to be well settled in New Hampshire in accordance with the instructions given to the jury, namely, that if they found that the accident was caused by the gross negligence of the defendants, they might, if they chose, give exemplary damages.

The same question was fully considered in *Hopkins v. Atlantic & St. L. Railroad*, 36 N. H. 9, and the conclusion reached that exemplary damages might be awarded in a case like this. This decision was in 1857, and, after a careful examination of the authorities on the point, we are fully satisfied with it.

In *Whipple v. Walpole*, 10 N. H. 130, the same question was considered, and the court held that if there was gross negligence the jury might award exemplary damages.

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In *Knight v. Foster*, 39 N. H. 576, which was an action for slander, it was held that where actual malice is shown the jury may award exemplary damages, what the defendant ought to pay and the plaintiff ought to receive; and, in *Symonds v. Carter*, 32 N. H. 466, it was held that in an action for slander, increased damages may be awarded for the increased malice and malignity of heart attending the uttering of the words; and this is a recognition of the doctrine that the jury are not confined to the idea of mere compensation for the injury, but may award damages by way of punishment and example.

In *Perkins v. Towle*, 43 N. H. 220, it was held that in trespass *quare clausum fregit*, exemplary damages may be recovered when there are such circumstances of aggravation, of insult, and of malice, as would warrant such recovery in other cases.

Upon this review of the adjudged cases in our own state, we might be amply justified in saying that the question was no longer an open one here; but as the point has been made at the bar, we have examined the decisions elsewhere, and are satisfied that there is a great preponderance of authorities in favor of the doctrine adopted in this state.

This doctrine is denied by an eminent jurist. Professor Greenleaf, in his work on Evidence, volume 2, section 203, in an elaborate note, in which he reviews the authorities, and urges with great force and ability that, upon principle, damages should be a just compensation for the injury actually sustained, and neither more nor less; and that to allow a jury to award damages by way of example, and as a punishment for a wrong committed, beyond a just compensation for the injury done to the plaintiff, would be a departure from the true principles upon which damages are awarded, that is not countenanced by the authorities when fairly considered.

The position is that for the legal wrong done to the plaintiff the defendant is bound to make full compensation; but for the moral wrong, whether it rises to the character of an offense punishable by law or not, he is answerable to society alone; that it is especially unjust to allow the plaintiff to recover damages beyond a fair compensation for the injury by way of punishment for an offense for which the defendant is liable to be punished by a public prosecution, inasmuch as in that way he is liable to be punished twice for the same offense.

The views of Professor Greenleaf are also expressed in an article in

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the Law Reporter of April, 1847. There is also an able article on the same side in 3 Am. Jurist, 287, by Hon. Thomas Metcalf, which seems to have taken the lead in opposition to the doctrine in question. On the other hand the subject is very fully discussed and the authorities reviewed by Mr. Sedgwick in his work on damages (4th ed.) chapter 18, page 454. In chapter 1, page 38, he lays it down that when fraud, malice, gross negligence or oppression mingles with the controversy, the law, instead of adhering to the system or the language of compensation, adopts a wholly different rule. It permits the jury to give what are called punitive, vindictive or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages not only to recompense the sufferer but to punish the offender. See also Mr. Sedgwick's article on the same subject in Law Reporter of June, 1847, in reply to Professor Greenleaf. The general doctrine of Mr Sedgwick is supported by a great weight of authority. Chancellor KENT in 1 Com. (9th ed.) 627, says that it appears to him that the conclusions in Mr. Sedgwick's treatise are well warranted by the decisions, and that the attempt to exclude all consideration of the malice and wickedness and wantonness of the tort, in estimating a proper compensation to the victim, is impracticable, visionary and repugnant to the just feelings of social sympathy.

Mr. Parsons, in his work on contracts, volume 2, page 449, expresses an opinion that the courts of this country generally permit a jury in certain cases to give damages which exceed the measure of legal compensation, and are justified by the principle that one found guilty of so great an offense should be made an example of, in order to deter others from the like wrong doing.

In the United States courts the doctrine of Mr. Sedgwick is recognized. In *Day v. Wentworth*, 13 How. 363, GRIER, J., in delivering the opinion of the court, said: "It is a well-established principle of the common law that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware," he says, "that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." As suggested by PERLEY, C. J., in *Hopkins*

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v. *The Atl. & St. L. R. R.*, the allowance of exemplary damages to the suit of a private individual finds countenance in that legislative policy which, by giving pecuniary penalties to private prosecutors of certain offenses, seeks to enlist their aid in enforcing many salutary penal statutes.

That doctrine which allows a jury to award exemplary damages to the sufferer by wrongful acts which the public is strongly interested to punish, stands upon the same footing, so far, at least, as the damages are merely punitive; and it is quite obvious, we think, that this furnishes the most efficient, if not the only, means of correcting many very serious social abuses; and among these, that gross negligence which puts at unnecessary hazard the life and limbs of large numbers of passengers must take a high rank. It is not, therefore, to be regretted that the law has established an exception to the ordinary rule in respect to damages, and armed the sufferer in such cases with the powers to administer a corrective which cannot or will not otherwise be efficiently applied at all.

The doctrine is not the result of direct legislation, as is the case with *qui tam* actions, but we think it has become too firmly established to be shaken without legislative action.

It has been contended that, however it may be in cases of fraud, malice and oppression, exemplary damages cannot be awarded for gross negligence merely. It will be observed, however, that it is otherwise settled in this state in the cases of *Whipple v. Walpole*, and *Hopkins v. Atlantic & St. L. R. R.*, before cited. It is also the doctrine of Sedgwick, as before stated. In some cases it has been held that the negligence must be of such a character as to evince a wanton disregard of human life and safety, equivalent to malice, as in *Pickett v. Crook*, 20 Wis. 358; *Wardrole v. Cal. Stage Co.*, 7 Cal. 118.

It has been held, also, that when the public wrong is punishable criminally, exemplary damages ought not to be awarded, upon the ground that if it were otherwise the wrong-doer would be twice punished for the same offense; and this is the doctrine in Massachusetts. *Austin v. Wilson*, 4 Cush. 273; and in Indiana, *Wassauren v. Rickert*, 18 Ind. 350; *Humphries v. Johnson*, 20 id. 190. On the other hand, it is held in New York in *Cook v. Ellis*, 6 Hill, 466, that in trespass for assault and battery the defendant shall not be permitted to prove in mitigation of damages that he has already been convicted and fined for the same offense, and has paid the fine.

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though it is supposed to be the correct practice to continue the criminal proceeding to await the decision of the civil suit, and then impose a fine in view of it, which is said to be the English practice, to which authorities are cited. So in *Fry v. Bennett*, 4 Duer, 247, which was a suit for a libel in the *New York Herald*, it was held that plaintiff might recover exemplary damages, although defendant was liable to indictment; and such is the doctrine of *Cole v. Tucker*, 6 Texas, 266. In *Corwin v. Walton*, 18 Mo. 71, it was held that exemplary damages might be recovered, although defendant had been convicted and fined for the same assault and battery, but that this fact might be considered in mitigation of damages, and also that the court in fixing the amount of the fine might properly consider a recovery in a civil suit. So in Ohio it is held, that exemplary damages may be awarded, although defendant may have been prosecuted criminally. *Roberts v. Mason*, 10 Ohio (N. S.), 277. See also Sedgwick on Damages (4th ed.), 535, and cases where the weight of authority is supposed to be against such a limitation. It is not necessary, however, to determine this question as it does not arise on this case.

It is contended by the defendants that there was no evidence tending to prove gross negligence; there was evidence, however, tending to prove that the accident was caused by the breaking of a rail about two feet from the end where the track was very much curved, and about fifteen or twenty feet from Amonoosuck river, and that two passenger cars were thrown part way down the bank; that the rail which broke was inside the curve; that it was an old rail and appeared very much worn and battered and broomed up from one to two feet from the end; that it was a U rail, the old style, and that the T rail is the new style; and that the train was going not over twenty miles the hour. It further appeared that the broken rail was not preserved or produced at the trial, although the defendants offered evidence to show that the breakage was caused by a hidden defect in the rail, which they were not in fault for not detecting.

We are of opinion, upon the whole, that there was evidence to go to the jury upon the point of gross negligence. It tended to show that the accident was caused by a defective rail, and that this one, at a place somewhat dangerous, was old and very much worn and battered and broomed; and whether there was gross carelessness in permitting that rail to remain under the circumstances was

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peculiarly for the jury to decide. Upon this point, therefore, we think there was no error; but for error in the instructions there must be

A new trial.

NOTE. The English case of *Redhead v. Midland Railway Co.*, 1 Albany Law. Journ. 318, decided by the exchequer chamber since the above decision, may be properly referred to in connection with this case. After a most elaborate review of the English and American authorities, the court established the doctrine, so far at least as relates to England, that carriers of passengers are not insurers of the absolute road-worthiness of their vehicles, or, in other words, that there is no implied contract that their carriages and machinery are free from those defects which neither skill, care, nor foresight can detect. In that case the plaintiff, while a passenger in defendants' car, was injured by an accident caused by the breaking of the tire of one of the wheels; it was proved that such breaking was owing to an air bubble in the tire, which was not attributable to any carelessness on the part of the manufacturers, nor was capable of detection afterward. *Held*, that the defendants were not liable. The case of *Alden v. The N. Y. Cent. R. R.*, 26 N. Y. 102, in which a contrary decision was made on nearly the same facts, was severely criticised and its authority very much shaken.

In the recent case of *Meier v. The Penn. R. R. Co.*, 64 Pa. 225, it is held, that *prima facie*, when a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence casting the *onus* upon the carrier of disproving it.

On the question of exemplary damages, see the case of *Goddard v. The Grand Trunk Railway Co.*, *ante*.

**NASHUA LOCK COMPANY V. THE WORCESTER AND NASHUA
RAILROAD COMPANY.**

(48 N. H. 330.)

Common carriers — Liability beyond their line — Associated companies.

Where there is a continuous line of different carriers, united by an agreement under which they carry goods through the connected line for one price, which they divide among themselves in proportions fixed in their agreement, if one of the carriers receives goods to be transported on the continuous line, marked for any place on it, and receives pay for transportation through, such carrier is *prima facie* bound to carry the goods, or see that they are carried, to the place of destination, and is liable for any accidental loss happening on any part of the connected line.

THIS was an action brought to recover the value of ten cases of locks, marked for Wiesbushhabatt & Co., New York, and delivered to defendants, as freight, at Nashua, N. H., to be transported to New York, freight paid for the entire distance. The defendants were a corporation owning and operating a railroad between

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Nashua and Worcester, which formed a connection at the latter point with the Norwich and Worcester railroad, which latter connected with a line of steamers from Norwich to New York, known as the "Norwich Transportation Company." These several companies had an arrangement to transport freight from Nashua to New York and to divide the price paid for transportation according to certain proportions fixed. The cases were properly forwarded by defendants and delivered to the Norwich and Worcester railroad, and were by the latter delivered to the transportation company, which shipped them on board one of their steamers for New York. This steamer collided during its passage with a sailing vessel, took fire, and was destroyed with its freight. The value of the steamer was ascertained, and a *pro rata* share assigned to defendants, who declined to pay it.

A. W. Sawyer, for plaintiffs.

G. Y. Sawyer, for defendants.

PERLEY, C. J. According to the agreed case, or the three corporations, the Worcester and Nashua railroad, the Norwich and Worcester railroad, and the Norwich and New York Transportation company, were engaged as common carriers in the business of transporting goods between Nashua and New York in a continuous line under an agreement by which they divided the price paid for transportation through in proportions fixed by the agreement. The agreement is not before us; but from the general statement of it in the case it must be inferred that the parties to it were mutually bound to transport goods on their connected line according to the direction given by the owner, when they were received for transportation in the usual course of the business by any one of the parties. In this case it would have been a violation of the agreement among the parties to the continuous line, if either the Norwich and Worcester railroad or the transportation company had refused to receive and transport the goods toward their destination in the usual course of the business, as they were marked and directed when they were received by the defendants.

The contract between the plaintiffs and defendants must be implied from the facts stated in the agreed case. There was no special agreement, written or oral, that the goods should be carried to New York, nor that the responsibility of the defendants should end on

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delivery to the Norwich and Worcester railroad. The general question is, whether the defendants undertook for the transportation of the goods through to New York, or only agreed to carry and deliver, or tender, them to the Norwich and Worcester railroad.

Had the defendants corporate authority to contract for the transportation of the goods beyond their own line? We have no hesitation in holding that railroads may contract to carry goods and passengers beyond their own lines. They could not answer the main objects of their incorporation without the exercise of this power. They are laid out and established with reference to connections in business with other extended lines of transportation, and the power to contract for transportation over the connected lines is implied in the general grant of corporate authority. On this point the authorities are nearly unanimous. It has been held otherwise in Connecticut by the opinion of three judges against two. *Hood v. N. Y. & N. H. Railroad*, 22 Conn. 1; *Elmore v. The Naugatuck Railroad*, 23 id. 457; *The Naugatuck Railroad v. The Button Company*, 24 id. 468. But in a later case (*Converse v. The Norwich & N. Y. Transportation Company*, 33 id. 166), the courts in that state have shown some disposition to recede from the doctrine of their earlier cases. No other authorities are cited by the defendants to this point, and I have found no others that sustain their view of this question. The authorities the other way are numerous and decisive (*Muschamp v. The Lancaster & Preston Railway*, 8 M. & W. 421; *Weed v. The S. & S. Railroad*, 19 Wend. 524; *The F. & M. Bank v. The Ch. Transportation Company*, 23 Vt. 186; *McCluer v. M. & L. Railroad*, 13 Gray, 124; *Rogers v. R. & B. Railroad*, 27 Vt. 110; *Wilcox v. Parmelee*, 3 Sandf. 610; *Perkins v. The P. S. & P. Railroad*, 47 Me. 573); and railroads may contract for transportation beyond the limits of the states in which they are established (*McCluer v. The M. & L. Railroad*, 13 Gray 124; *Burtis v. B. & S. L. Railroad*, 24 N. Y. 369); and when a railroad makes a contract for transportation beyond its own line it will be presumed that it had authority to do it. *McCluer v. M. & L. Railroad, qua supra*.

In the agreed case it is said the goods were received to be *forwarded*, etc., and from this phrase an argument is drawn that the agreement of the defendant was to forward to the next party in the line, and not to carry through to New York. But here *was* no express agreement in any particular terms and we are not called on to interpret the language used in any contract. The nature of

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the undertaking must be inferred from the facts stated in the agreed case, and cannot be determined by the phrase used in stating them. Even in a written contract, where the term *forwarded* is used, if the thing to be done belongs to the business of a carrier, he will be charged as such. In *Wilcox v. Parmelee*, 3 Sandf. 610, the court say: "The criticism of the defendant on the word *forwarded* used in the contract is not just. It applies to the whole distance, as well to those portions of the route where other parties were owners of the vessels, as to that portion where he employed his own means of transportation. He was to forward the goods from New York to Fairport, not to Buffalo, which he now says was the terminus of his own immediate route. The words used by him can only mean that he was to carry or transport the goods, and whether in his own vessels or in those of others was perfectly immaterial to the plaintiff." In *Schroeder v. The Hudson River Railroad*, 5 Duer, 55, the defendants gave a receipt for goods "to be *forwarded* per Hudson river freight train to Chicago;" and under this receipt it was held that the defendants were bound to *carry* the goods to Chicago. So in the recent case of *Buckland v. The Adams Express Company*, 97 Mass. 124, the defendants were charged as common carriers, though they described themselves in the contract under which they received the goods, as "express forwarders." In the present case the undertaking of the defendants must be implied from the facts stated in the agreed case, and the particular language used in stating them is of no materiality.

Since the introduction of steam as the means of transportation by land and water the general question raised in this case has been much considered in different jurisdictions, and there is no little confusion and contradiction of authority respecting the rule which shall govern the rights and liabilities of the parties, where goods are put in the course of transportation to distant places through connected lines associated in the business of common carriers. Where such lines are engaged in carrying passengers and their luggage the several parties to the continuous line incur, it would seem, the same liabilities for damage and loss of the luggage as in cases where they carry goods only. *Darling v. The Boston & Worcester Railroad*, 11 Allen, 295; *Quimby v. Vanderbilt*, 17 N. Y. 312; *Weed v. The Railroad*, 19 Wend. 534; *The Ill. Central Railroad v. Copeland*, 24 Ill 332; *Ill. Central Railroad v. Johnson*, 34 id. 382.

In England and in several of the United States it has been held,

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that when a railroad or other common carrier receives goods marked or otherwise directed for a place beyond the carrier's own line, this alone is *prima facie* evidence of a contract to carry the goods to their final destination, though the freight money for transportation through is not paid to the carrier that receives the goods, and though he is not shown to have any connection in business with other parties beyond his own line. *Muschamp v. The Lancaster and Preston Railway*, 8 M. & W. 421; *Watson v. The Ambergate, Nottingham and Boston Railway*, 3 L. & E. 497; *Collins v. The Bristol and Exeter Railway*, 11 Exch. 790; S. C., 7 H. L. C. 194; *Coxon v. The Great Western Railway*, 5 Hurl. & N. 274. These and several other cases show that in England, after the fullest discussion in all the courts, the rule is firmly established that a carrier who receives goods marked for a place beyond his own line is *prima facie* bound to carry them as directed to their final destination, and it is there held that the contract in such case is entire, and with the first carrier alone; that until some connection in the business, which has the general nature, if not the technical character, of a partnership, appears between him and the subsequent carriers, no action can be maintained against them by the owner, though the goods were lost or damaged on their part of the route.

I have not met with an American case in which the rule has been pressed to the extent of holding that the owner cannot come on any carrier by whose default the loss or damage actually happened. There are, however, numerous authorities in the United States for the general rule of *Muschamp v. The Railway*, that the receipt of goods marked for a place beyond the line of the carrier who receives them implies a contract to carry them to their final destination, though no connection in business is shown with other carriers beyond, and though the price for transportation through is not paid in advance.

In *Foy v. The Troy and Boston Railroad*, 24 Barb. 382, the doctrine of the case is stated in the head note to be, that "where a railroad company receives for transportation property addressed to a person at a point beyond the terminus of the road, he will be understood, in the absence of any proof to the contrary, to have agreed to deliver the property, in the same order and condition in which it was received, to the consignee." The court say: "It was no part of the plaintiff's business to inquire how many different corporations made up the entire line of road between Troy and Burlington, or,

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having ascertained this, to determine at his peril which of said companies had been guilty of the negligence which resulted in the injury to his wagon." In *Schroeder v. The Hudson River Railroad*, 5 Duer, 55, the agent of the defendants gave the following receipt at New York: "Received of Schroeder six boxes—to be forwarded per Hudson River Railroad freight train to Chicago, Illinois;" and it was held that the defendants under this receipt were bound to transport the goods to Chicago. No connection in business with other carriers was relied on. In *Kyle v. The Laurens Railroad*, 10 Rich. (Law) 282, the rule of *Muschamp v. The Railway* was approved. O'NIEL, J., says: "The case of *Muschamp v. The Lancaster and Preston Junction Railway* states, I think, the true rule." The rule of *Muschamp v. The Railway* was approved and adopted in the *Central Railroad v. Copeland*, 24 Ill. 332, in which it was held that "a railroad corporation selling tickets through over its own and other roads is liable for the safety of passengers and their baggage to the point of destination." The case was put on the same ground as when goods are received marked for a place beyond the line of the carrier that receives them. The court say: "We are inclined to yield to the force of the reasoning of the English courts on principles of public convenience, if no other, and to hold when a carrier receives goods to carry, marked for a particular place, he is bound to carry and deliver at that place. By accepting the goods so marked he impliedly agrees so to do, and he ought to be answerable for that loss." In the later case of *The Central Railroad v. Johnson*, 33 Ill. 382, it was decided in the same state that "when a carrier receives goods to carry marked for a particular place, he is bound under an implied agreement from the mark or direction to carry to and deliver at that place, though it be a place beyond his own line of carriage." In *The Detroit and Milwaukee Railroad v. The F. & M. Bank*, 20 Wis. 122, the railroad gave a receipt for the goods directed to New York, but the receipt provided that the railroad should not be liable beyond their own road, and it was held that by an express agreement a carrier might limit his liability to his own road when he receives goods marked for a place beyond it. The road was in that case discharged, upon the ground of an express agreement that it should not be liable beyond its own line, from which the inference is plain, that, in the absence of an express agreement controlling the contract otherwise implied from the receipt of the goods marked for a place beyond its line, the road

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will be liable for a loss happening beyond. In *Angle v. The Mississippi and Missouri Railroad*, 9 Iowa, 487, it was decided that "when a common carrier receives goods marked for a particular place beyond the *terminus* of his route, unaccompanied by any direction as to their transportation and delivery except such as may be inferred from the marks, he is *prima facie* bound to carry and deliver them according to the marks."

St. John v. Van Santvoord, 25 Wend. 660, is a strong authority for the rule that, when goods are received by a carrier marked for a place beyond his line, he is bound to carry them to their final destination, if there is nothing to control the contract implied by the receipt of the goods so marked. NELSON, C. J., delivering the opinion of the court, says: "It appears to me such a contract is fairly to be inferred from the receipt of the captain in the absence of any explanation. The box was directed to J. Petrie, Little Falls, Herkimer county, indicating plainly to whom the plaintiffs were desirous of sending it, and was delivered on board for the express purpose of transshipment to him; and without any qualification or explanation the agent received the article and gave his receipt, in effect saying to the plaintiff, I will take and deliver it at the place of destination according to the direction. So the plaintiffs must have understood the contract. It is the plain interpretation of the transaction. If the defendants had intended to limit their duty as common carriers short of the place of destination, they should in some way have indicated to the plaintiff this intent." The judgment of the supreme court in this case was reversed by the senate (6 Hill, 157), upon the ground that the court should have received evidence of a custom controlling the general effect of the receipt of the goods marked for the place of destination, though the custom was not known to the plaintiff; leaving the doctrine untouched that the receipt of the goods so marked, in the absence of evidence to explain and control the transaction, would imply an agreement to carry to the place for which they were marked.

The American authorities above cited sustain the doctrine of *Muschamp v. The Railway*, that, when a carrier receives goods marked for a place beyond his own line, he is, *prima facie* and in absence of other evidence, bound by an implied contract to carry the goods to the place for which they are marked, though he has no connection in business beyond his own line, and though he does not receive pay for transportation through.

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There is another class of American cases which hold that the mere receipt of goods marked for transportation beyond the line of the party that receives them is not evidence of a contract to carry beyond his own line, if he has no connection in business with carriers beyond; but that, if several carriers associate in a continuous line, carry goods for one price through, and divide the freight money among them in an agreed ratio, though they may not be technically partners, but only *quasi* partners, yet, as to third persons who intrust goods to them for transportation, they are jointly liable for a loss that happens in any part of the continuous line, though the freight money is not paid to the first carrier on delivery of the goods to him.

In *Champion v. Bostwick*, 11 Wend. 571; S. C., 18 id. 174, several proprietors of different sections in a connected line of stage coaches divided the receipts of the whole route in proportion to the miles run by each; and it was held that they were jointly liable as partners for an injury to a third person, not a passenger, caused by the negligence of one of them. It is to be observed, that in this case the receipts of the way as well as the through travel were brought into the account; and on this a distinction has been taken between that case and one where the receipts of the through travel only are divided; and for that reason it has been said that, in a case like the present, there is no partnership and no joint liability. But as to parties who deal with the through line, it is of no consequence how the other business is managed, or whether any other business is done by the associated carriers. At most, the distinction is merely technical and has no substance. Nor am I acquainted with any legal principle to prevent one engaged in a general business from having a partner in one distinct part of it, like the through business in this case, without bringing all his business of the same kind into the partnership account. I take it to be no uncommon thing for a trader to have a partner in his business done at one place, who has no concern in his business of the same kind transacted at other places; that attorneys form partnerships limited to certain parts of their business, and merchants, in the voyages, or in a single voyage, of one ship.

Hart v. The Rensselaer & Saratoga Railroad is to the point that "where three separate railroad companies, owning distinct portions of a continuous railroad route between two termini, run their cars over the whole road, employing the same agents to sell passenger

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tickets, and receive luggage to be carried over the entire road, an action may be maintained against any one of them for loss of luggage received at one terminus to be carried over the whole road." SMITH, J., delivering the opinion of the court in *McDonald v. The Western Railroad*, 34 N. Y. 501, 502, says: "We may judicially take notice of the fact that the vast business of inland transportation of goods is carried on mainly upon routes formed by successive lines belonging to different owners, each of whom carries the goods over his own line and delivers them to the next. Many of these routes extend over thousands of miles. Their proprietors unite and receive goods for transportation *upon the promise, express or implied*, that they shall be carried safely to the place of delivery. The owner has lost sight of his goods when he delivers them to the first carrier, and has no means of learning their whereabouts till he or the consignee is informed of their arrival at the place of destination."

In *Wibert v. The Erie Railroad*, 12 N. Y. 256, it was said, that, "where a carrier is in the habit of receiving and forwarding goods directed to any particular place, an agreement on his part to take them there has been presumed; but where these operations are entirely disconnected, there is no partnership. In *Bradford v. The Railroad Company*, 7 Rich. (L.) 201, it was held that "an advertisement of a through line and the course of the business is evidence to charge all the roads engaged in the continuous line of transportation as jointly liable for carriage through the whole route." REDFIELD, C. J., in delivering the opinion of the court in *The F. M. Bank v. The Transportation Company*, 23 Vt. 131, speaking of *Weed v. The S. & S. Railroad*, 19 Wend. 534, says: "That case is readily reconciled with the general rule that such carrier is only bound to the end of his own route, by the consideration that in this case there was a *kind of partnership connection* between the first company and the other companies constituting the entire route, and also that the first carrier took pay and gave a ticket through, which is most relied on by the court; and in such cases where the first company gives a ticket and takes pay through, it may be fairly considered equivalent to an undertaking to carry throughout the entire route." In a note to this case by REDFIELD, C. J., he says: "In that case (*Weed v. The Railroad*) the court seem to put the case more upon the fact of taking fare and giving a ticket through, which, in practice, is seldom or never done, except where there is a *quasi partnership* throughout the route." This would seem to be a

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strong authority that where there is a connected line of carriers, and a *quasi*, though it may not be technical and legal, partnership, they are liable jointly for carriage through the whole connected route.

By the statute of New York, enacted in 1847, "whenever two or more railroads are connected together, any company owning either of said roads receiving freight to be transported to any place in the line of either of said roads, shall be liable as common carriers for the delivery of such freight at such place." This statute has received a liberal construction, and been held to make a railroad in New York liable for a loss on a road in the connected line beyond the limits of the state (*Burtis v. The Buffalo & State Line Railroad*, 24 N. Y. 269); but not to discharge an intermediate carrier for loss caused by his own fault. *Smith v. The N. Y. Central Railroad*, 43 Barb. 225.

In *The Cincinnati H. & D. Railroad v. Speat*, 2 Duval, 4, it was decided that "where several parties are associated for the transportation of freight from Louisville to New York, executing through bills of lading and charging through freight, they will be chargeable as common carriers between those points; and in such cases public justice and commercial policy require a stringent construction against any intermediate irresponsibility as common carriers." Two points were decided in this case: that the defendants were liable as common carriers for transportation through to New York; and that, on the facts of the case, they held the goods as common carriers and not as warehousemen. The court say: "The facts conduce to prove that the appellants, associated as they were with steamboats and other carriers from Louisville to Cincinnati as joint transporters between those points, and jointly charging through freight and giving through receipts, were, in the popular and technical import, common carriers to the whole extent between those termini; and in such cases, where associated companies are engaged in a common undertaking for transportation on a long line, public justice and commercial policy require a stringent construction against any intermediate irresponsibility as common carriers." This reasoning applies with full force to the present case.

In 2 Redfield on Railways, 104, the learned author sums up the result of the American cases on this particular point as follows "The American cases upon the subject, with rare exceptions, recognize the right of a railroad company to enter into special contracts to carry goods beyond the line of their road; and where different

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roads are united in one continuous route, such an undertaking, when goods are received and booked for any part of the line, is almost a matter of course." In the present case the defendants were united in a continuous line to New York; the goods were received *marked*, which must be equivalent to *booked*, for New York; and the case would seem to fall clearly within the rule laid down in *Redfield* as the result of the American authorities.

There is still another class of cases, in which it is held that the fact of a carrier's receiving pay for transportation to a place beyond his own line implies a contract to carry to that place. In the case of *Hyde v. The Trent & Mersey Navigation Company*, 5 T. R. 389, decided in 1793, the marginal note is as follows: "Common carriers from A. to B. charge and receive for cartage to the consignee's house at B. from a warehouse there, where they usually unloaded, but which did not belong to them; they must answer for the goods if destroyed in the warehouse by an accidental fire, although they allow all the profits of the cartage to another person, and that circumstance were known to the consignee." The four judges delivered their opinions *seriatim*, and all agreed that the charge for cartage to the house of the consignee "put the case out of all doubt," and bound the carriers who made the charge to carry the goods to their final destination. In answer to the argument that the carriers acted as agents of the owner in forwarding the goods beyond their own line, Mr. Justice BULLER said: "According to the defendants' own argument great inconvenience would result to the public from adopting the other rule. According to their argument there must be two contracts, where goods are sent by coach or wagon. But I think the same argument tends to establish the necessity of three; one with the carrier, another with the innkeeper, and a third with the porter. But in fact there is but one contract; there is nothing like any contract or communication between any other person than the owner of the goods and the carrier. But I rely on the charge which the defendants compelled the plaintiff to pay before they would engage to deliver the goods. The different proprietors may divide the profits among themselves in any way they choose, but they cannot exonerate themselves from their liability to the owner of the goods." This case, coming before the agitation of these questions on the introduction of steam as a motive power, and decided on the general principle applicable to the liability of carriers at common law, is certainly of very great weight. It decides that when a carrier

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receives goods to be transported beyond his own line, and takes pay for carrying them to their final destination, he agrees to do what he has been paid for doing; and it repudiates the fanciful theory of an agency for the owner to forward the goods, and in his behalf procure them to be carried by others.

In *Weed v. The Saratoga & Schenectady Railroad*, 19 Wend. 534, the plaintiff's agent took passage at Saratoga in the Saratoga and Schenectady railroad for Albany, and paid his fare to Albany. The route to Albany consisted of the defendants' and the Mohawk and Hudson River railroad. When the agent arrived at Albany his trunk, containing money of the plaintiff, was missing, and this action was brought to recover for the loss. One ground taken for the defendants was, that there was no evidence the trunk was lost on their road. There was no evidence of a contract to carry to Albany except such as was implied from the fact that the two roads made a continuous line to Albany, and the defendants took the trunk for carriage to Albany and received the pay for carrying through. It was held that the payment and receipt of fare through bound the defendants as carriers over the other road through the whole continuous route.

Wilcox v. Parmelee, 3 Sandf. 610, is an authority to the same point, that receiving pay for transportation to a place beyond the line of the carrier who receives it implies a contract to carry to that place. The court say: "Besides, there is a fixed sum which covers the whole charge; and it would be absurd to suppose that the defendant was to receive the whole sum for merely forwarding, that is, placing, the goods on the vessels of some other party to be carried to their place of destination."

Van Santvoord v. St. John, 6 Hill, 157, cited for the defendants, recognizes the doctrine of *Weed v. The Railroad*. In his opinion for reversing the judgment of the supreme court the chancellor says: "In the case of *Weed v. The Railroad*, the two lines were connected together by an arrangement between themselves, and the agent of the defendant took the pay in advance for the conveyance of the plaintiff and his baggage the whole distance. Or, if no actual connection between the two lines was proved, it at least appeared that the defendant permitted its agent to hold it out as a carrier of passengers and their baggage for the whole distance, *by taking pay therefor*." It thus appears that in *Van Santvoord v. St. John*, as in *Hyde v. The Navigation Company*, taking pay for

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carriage to a place beyond the line of the party that takes it is regarded as decisive of an undertaking to carry to that place. *Quimby v. Vanderbilt*, 17 N. Y. 315 is to the same point, that receiving pay for carriage through a continuous line imports a contract to carry through; and in *Burtis v. The Buffalo & State Line Railroad*, 24 N. Y. 269, 278, SUTHERLAND, J., says: "It would appear to be settled by both the American and English cases, that when from usage in the particular business, or by receiving pay to the place to which the goods are addressed, beyond the railway company's road, or from any other circumstance, it is to be presumed that the undertaking of the railway was to deliver at such place, they are responsible for the delivery of the goods at such place, and are liable if the goods are lost after leaving their road."

In *Choteaux v. Leach*, 18 Penn. St. 224, furs were shipped at Cincinnati for New York. The defendants admitted that they were carriers on the canals and railroads of Pennsylvania, but denied that they were on the river Ohio. The furs were lost in a steambout on that river. The court (BLACK, C. J.) say: "They, the defendants, received the full freight from Cincinnati to New York; and this is wholly inconsistent with the notion that they were agents for the shipment of the furs, and not carriers from Cincinnati to Pittsburg, as well as on other parts of the route." To the same point is *The Baltimore & Philadelphia Steamboat Company v. Brown*, 54 Penn. 77, which cites and approves *The Illinois Central Railroad v. Copeland*, 24 Ill. 338; *The Illinois Central Railroad v. Johnson*, 34 id. 382, and *The Railroad v. Schwartzburg*, 9 Wright, 208. So in *Candee v. The Pennsylvania Railroad*, 21 Wis. 582, where a railroad sells a through passenger ticket by a specified route to some point out of the state over lines belonging to other companies, it seems the understanding of the first company is to transport the passenger and his baggage to such place of destination. *Cary v. The Cleveland & Toledo R. R.*, 29 Barb. 36, is to the same effect, and also *The Illinois Central R. R. v. Copeland*, 24 Ill. 332, in which it was held, that a railroad selling tickets through over its own and other roads is liable for the safety of passengers and their baggage to the point of destination. *Wheeler v. The Railroad*, 31 Cal. 52, cites and apparently approves the doctrine as laid down on this point in 2 Redfield on Railways, 109. In *Carter v. Peck*, 4 Sneed (Tenn.), 203, the defendants received fare and gave a ticket to a point beyond their own line; it was held that they were liable

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for a detention beyond their own line. HARRIS, J., delivering the opinion of the court, says: "When the defendants received the plaintiff's money and gave him a through ticket, they thereby became bound for his transportation over the entire line. The arrangement between the defendants and the proprietors of other portions of the line was a matter with which the plaintiff had nothing to do. He was no party to that arrangement, nor was he bound to look to any person for the performance of the defendant's undertaking to any person but themselves."

Redfield (in *Red. of Railways*, 109) sums up the result of the authorities on this point as follows: "It has generally been considered, both in this country and in the English courts, that receiving goods destined beyond the terminus of the particular company, and giving a check or ticket through, does import an undertaking to carry through, and that this contract is binding on the company."

Then, again, there are American cases which maintain the doctrine that, though carriers are associated in a continuous line, and one of them, on receiving goods marked for transportation through, takes pay for transportation through, which by agreement of the parties to the continuous line is divided among them in a fixed proportion, yet, in the absence of a positive agreement, each carrier is liable for loss on his own line, and not for a loss on any other part of the connected line.

This appears to be the settled rule in Connecticut. In *Hood v. The New York & New Haven Railroad*, 22 Conn. 1, the defendants' road was connected with a line of stage coaches which runs from their terminus to Coleville; and they advertised that passengers by their line went by stage from Farmington to Coleville. The plaintiff bought a ticket of the defendants at New Haven for Coleville. The conductor on the said road took up the plaintiff's ticket and gave him one for the stage. The plaintiff was injured on the stage route. The whole fare through was paid to the defendants, and they accounted on settlement with the proprietors of the stage line; and this was according to the custom of the business. There was no other contract between the stage company and the railroad. It was held that there was no contract by the defendants to carry the plaintiff on the stage route. The decision would seem to have been put mainly on the ground that the defendants had no corporate authority to contract for carriage beyond their own line. In *Elmore v. Naugatuck Railroad*, 23 Conn. 457, it was decided that neither

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the receiving of goods directed to a point beyond the line of the road, nor an advertisement of the general facilities of transportation through the route is evidence of a special contract to carry goods to the place to which they were directed. *The Naugatuck Railroad v. The Button Company*, 24 Conn. 468, is of the same effect; and in the latter case of *Converse v. The Norwich & Worcester Transportation Company*, 33 id. 166, the court consider the question as settled in Connecticut.

In Maine a single case is cited by the defendants — *Perkins v. The P. S. & P. Railroad*, 47 Me. 573, and I have found no other in that state bearing on the present question — the head note of which is as follows: "A railroad company may be bound by special contract (but not otherwise) to transport persons or property beyond the line of their own road." It is to be observed that in this case of *Perkins v. The Railroad*, the plaintiff had judgment on the ground of a special contract, from which the negative inference is drawn that the plaintiff could not recover otherwise than by a special contract. This cannot be regarded as quite equivalent to a direct decision on the point, for if the point was raised in the case it certainly did not require the court to determine whether a special contract was necessary to charge the defendants; and, besides, there is reason to think that the term "express contract" could hardly have been used in its strict sense to signify a contract in the form of a direct promise or undertaking in language, oral or written, proper to show a positive agreement, since the judge who delivered the opinion of the court speaks of a case where the carriers would be liable, on the ground that they "held themselves out as common carriers to that place;" in which case, as I understand it, the contract would not be express, in the strict or usual sense of the term, but implied from the conduct of the party. And the same learned judge also says: "It is of great public convenience, if not absolute necessity, that several companies should combine their operations, and thus transport passengers and merchandise, by a mutual arrangement, over all their lines, upon one contract, for one price. In such cases each is held liable for the whole distance." Instances are to be met with in other books of a similar latitude in the use of the term *special contract*, as in 2 Redfield on Railways, 104, where the term *special contract* is used, but the example given is of a contract implied from certain facts. For these reasons we are not inclined to regard *Perkins v.*

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The Railroad as a direct and final decision by the courts in Maine of the question raised in the present case.

In *Nutting v. The Connecticut River Railroad*, 1 Gray, 502, the supreme court of Massachusetts decided that "a railroad corporation receiving goods for transportation to a place beyond the line of their road, on another railroad which connects with theirs, but with the proprietors of which they have no connection in business, and taking pay for transportation over their own road only, are not liable, in the absence of any special contract, for loss of the goods after their delivery to the proprietors of the other road." This could hardly be regarded as an authority for the defendants in the present case; and I find nothing in the opinion of the court which carries the doctrine of the case beyond the statement of the head note. But in later cases the rule has been established in Massachusetts that a carrier is not bound for the transportation of goods beyond his own line, in the absence of a positive agreement to that effect. In *Darling v. The Boston and Worcester Railroad*, 11 Allen, 295, it was decided that if an arrangement is made between several connecting railroad companies, by which goods to be carried over the whole route shall be delivered by each to the next succeeding company, and each company receiving them shall pay to its predecessor the amount already due for carriage, and the last one collect the whole from the consignee, a reception of such goods by the last company, and payment by it of the charges of its predecessors, will not render it liable for an injury done to the goods before it received them." From this case the general rule has been deduced in Massachusetts, that a carrier is not liable for loss beyond his own line without a *positive agreement* to be so liable, though some of the discussion in *Darling v. The Railroad* seems hardly consistent with such a rule, for the learned judge who delivered the opinion says: "The usage as to the manner of doing the business enters into the contract as part of it, in the absence of an express contract. But the convenience of commerce makes it highly useful to send goods to distant places which can be reached only by independent lines of transportation. It is important that this business should be accommodated, and this may be done by express agreement or *established usage*. It is frequently done in this country by arrangements made by the proprietors of connecting lines with each other; and this is much better than to leave any important matter of this kind to be settled by usage. When such arrangements are made the liability

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of each line is to be determined by a fair construction of their terms." That is to say, usage enters into the contract on which the goods are carried for the owner; but when the business is done on the connected line, by an agreement among the parties to it, the liability of the different parties to the owner for the transportation of his goods is to be determined by a fair construction of the terms of the agreement among the parties to the connecting line, and the contract on which the goods are carried is inferred from usage, or from the arrangements among the parties to the connected line, and in such case does not depend on any positive agreement between the owner of the goods and any one of the carriers.

We have been furnished with a manuscript copy of the opinion in *Goss v. The New York, Providence and Boston Railroad*, decided in Suffolk, March, 1868, since reported (99 Mass. 220), in which, on facts that we cannot distinguish from the present, the court held that the point was settled by the prior decisions in Massachusetts, especially by the case of *Darling v. The Railroad*, and declined to discuss the general question further. And in the case of *Burroughs v. The Norwich and Worcester Railroad*, decided in September, 1868, we have also been furnished with the opinion of the court, holding the law to be well settled in Massachusetts, that a corporation established for the transportation of goods over a line between certain points, and receiving goods directed to a more distant point, is not responsible beyond the end of its own line, unless it makes a positive agreement extending its liability. And this rule, if a newspaper report can be trusted, was applied in *Pendergast v. The Adams Express Company*, by the same court to the case of an express company that gives a receipt for money directed to a place beyond the line of the company that gives the receipt.

It has been said that the English rule on this subject has not been generally adopted in this country. A review, however, of the American cases shows but too plainly that if our courts have differed from the English, they are far from agreeing among themselves in any principle or doctrine that can be called the *American rule*. There is not only much confusion, but no little conflict, in the American authorities. A large proportion of them are not directly in point for the present case, which must be decided on the facts found by agreement of the parties.

The following are the facts and circumstances from which the contract between these parties must be inferred:

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The three corporations were engaged as common carriers in the transportation of goods in a connected line between Nashua and New York, under an agreement among the parties to the connected line,

In the present instance, and generally under the agreement, one price was paid for transportation through;

The freight money was divided among the parties to the connected line in proportions fixed by their agreement;

The goods were received by the defendants for transportation on the connected line marked for New York;

The legal inference from the general statement of the agreement is, that the parties to the continuous line were bound by their mutual contract to take from each other and carry through goods, so marked, that might be received by any one of them;

The price for transportation to New York was paid to the defendants, when they received the goods.

The American authorities are comparatively few, which hold that when all these circumstances concur, the carrier who receives the goods is not bound, by an implied agreement, to carry them, or see that they are carried, over the connected line to their final destination. I do not find that the decisions in any of the states sustain this defense, except in Connecticut, Maine and Massachusetts.

With regard to the cases in Connecticut, it cannot imply a want of the respect due to the courts of that state, if I say that for two reasons their cases on this point are not entitled to all the deference that is paid to their decisions on other subjects. In the first place, it is held there that railroad corporations have no corporate authority to contract for the transportation of goods or passengers beyond their own lines; a doctrine rejected everywhere else. If it were admitted that railroads had the power to make such contracts, it does not appear that the courts in Connecticut would have decided that the plaintiff in a case like this would not be entitled to recover. Indeed it would seem, from the opinion of the court, as delivered by ELLSWORTH, J., in *Elmore v. The Naugatuck Railroad*, 23 Conn. 457, that in Connecticut these defendants would be held liable if their power to contract were conceded. He says "no money was paid, or agreed to be paid, for conveying the leather to any specific place. There was no evidence or claim that there was any connection between the defendants and the steamer, except that in the customary way of forwarding freight they delivered the goods to

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each other, from time to time, as they were marked for transportation, no matter to what place, whether to New York, California, Europe or Asia. It is obvious that where the different carriers throughout the route are connected in business by some joint undertaking or partnership, there can be no difficulty in case of a loss which happens on any part of the line; but the question arises, where this is not the case, what is the law then?" From this it seems to me that we are warranted in supposing, if the defendants had power to contract and the facts had been such as are found in the present case, the court in Connecticut would have no difficulty in charging the defendants for a loss happening in any part of the line. Then, again, these decisions in Connecticut were by three judges against two; WAITE, then chief justice, and HINMAN, who has since filled that place. The reasons for holding the defendants liable in *Elmore v. The Railroad* are very ably and forcibly stated by WAITE, C. J., in his dissenting opinion. Such dissent, it is evident, leaves the authority of the cases so much reduced that they cannot be entitled to great weight out of the jurisdiction in which they were decided.

The single case of *Perkins v. The P. S. and P. Railroad*, for reasons before suggested, we cannot consider as a final settlement of the question in Maine.

But in Massachusetts the court, in a series of decisions, have established the rule that a carrier, though associated with others in a connected line of transportation, is not liable for a loss happening beyond his own line without a positive agreement to that effect; and this rule is applied to the baggage of passengers, and the undertaking of express companies that receive goods for transportation beyond their own lines. The fact that, notwithstanding the earlier decisions, suits have continued to be brought in that commonwealth against parties that have received goods to be transported on continuous lines for losses happening beyond their own lines, might seem to suggest a suspicion that the profession and the public had not readily acquiesced in the rule as there laid down; but the court have adhered firmly to the rule, and in some of the later cases have apparently declined to enter on the discussion of the question, treating it as finally settled; and we must, therefore, consider the high authority of that court as against the right of the plaintiffs to recover in this action. So far, however, as that court may be understood to have established the rule, that to bind a railroad for trans-

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portation beyond its own line there must be an express and positive agreement between the railroad and the owner of the goods, and that such an undertaking is not to be implied from facts such as are found in this case, the current of American authority, to say nothing of the English, appears to be strong the other way. Excepting the cases in Connecticut and Maine, which, when examined, do not, I think, give the Massachusetts doctrine any very strong support, the authorities in other states, though they differ much in other particulars, generally agree in this, that where, as in the present case, there is a continuous line of different carriers united by an agreement under which they carry goods through the connected line for one price, which they divide among themselves in proportions fixed in their agreement, if one of the parties receiving goods to be transported on the continuous line, marked for any place in it, and on receiving the goods takes pay for transporting them to that place, the party so receiving the goods and the pay for transportation, is *prima facie* bound by an implied agreement to carry the goods, or see that they are carried, to the place for which they are marked, and is liable for a loss happening on any part of the connected line.

If the case were to be considered on authority only, we should feel bound to decide for the plaintiffs, inasmuch as we find the weight of authority to preponderate heavily in their favor; and taking general principles and reasons of convenience and public policy for our guide, we are led to the same conclusion.

In the view which the plaintiffs ask us to take of this case, when the goods were received by the defendants, marked for transportation to New York, and the price paid to the defendants for transportation through on the continuous line, the plaintiffs made one contract with the defendants, by which the defendants agreed, either as joint carriers with the other associated parties, or as undertaking for them to carry the goods through for the price paid, as goods were carried in the usual course of the business on that line. In that view the plaintiffs would have nothing further to do in the matter. Every thing else was provided for by the agreement among the associated carriers; for by their agreement the defendants were bound to transport, and the successive carriers would be bound to take and carry, the goods from each other to their final destination. The price through was paid, and belonged to the different carriers in proportions fixed by their agreement, and this theory would agree exactly with the facts; for the plaintiffs in fact made but one

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agreement with one party to have the goods carried for one price to New York. No further stipulation or direction on the part of the plaintiffs was necessary, and none was ever in fact given by owners of goods who put them in the course of transportation, as these were put, in the continuous line.

According to the defendants' theory of the case, when the plaintiffs delivered the goods marked for New York, and the defendants received them and took pay for transportation through, no contract was made with any party to carry the goods through; but the contract then made by the defendants was to carry the goods to the next carriers on the connected line with the surplus money, and, as agents of the plaintiffs, make a contract if they could with the next carriers to take the goods and the money, and carry them on in the same way through successive agencies for the plaintiff to their final destination. If these agents should consent to act for the plaintiffs, and be able to negotiate bargains with the other carriers for transportation through, the goods would go to New York as was intended; but they would go under three separate contracts, made at different times through this imaginary agency, with three different and independent parties.

The first objection to the defendants' theory of this transaction is, that it is contrary to the fact. The owner of goods in a case like this does not in fact appoint or employ the successive carriers in the continuous line as his agents to hold his money for him, and as his agents carry it forward and contract in his behalf with the other roads for further transportation. He makes but one contract for one price; he pays the price, and the money he has paid does not belong to him, but to the associated carriers, in proportions fixed by their agreement. He does not inquire, nor is he interested to know, how they divide the money. The contract is entire and complete when he pays the price for transportation through, and every thing to be done afterward is regulated by the standing agreement among the associated carriers. He has no control over them as his agents; he does not and cannot intermeddle with the manner in which they do the business or dispose of the money that he has paid for the carriage of his goods.

Let us see what are some of the consequences that would follow, if both parties in a case like this should act on the defendants' view of their legal rights. Suppose in this case the goods had been carried through to New York, and the defendants had not paid to

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the next carriers the proportion of the freight money which belonged to the other carriers; and then suppose that the Norwich and Worcester railroad should sue the plaintiffs for carrying the goods over their road. It would avail the plaintiffs nothing to say that they had paid the freight through when the goods were received at this end of the route. The ready answer would be: "To be sure, you put money into the hands of your agents, the Worcester and Nashua railroad, to pay us, but they neglected their duty; your money is still in their hands, and we are not paid." It is, however, quite clear, that the money received by the defendants for transportation through on the connected line would be held by them for all the parties to the line; they would be bound to account for it under their agreement as one partner accounts with his fellows for money received on partnership account. Then, if the plaintiffs should undertake to pay the different carriers, how are they to know the share of each? The proportions of the freight money belonging to them respectively are regulated by a private agreement of which the plaintiffs know nothing, and of which, in the way the business is actually conducted, they have no need to be informed. If the plaintiffs had proposed when they delivered the goods to pay the Worcester and Nashua road their proportion of the freight money, and afterward to pay the other carriers their respective shares, they probably would have found nobody to tell them what the different shares were, or to receive the goods to be carried on such terms. In truth, the connected line transacts business as one joint concern, and the business cannot be transacted otherwise with convenience either to the carriers or the owners of the goods.

Then if we look to the remedy of the associated carriers for the recovery of the freight money, each, on the theory of the defendants, must bring a separate suit on the separate contract for his proportion of the money. We have had occasion to learn, from the facts stated in another case now pending before us, that there is a connected line, consisting of six or seven different railways, extending from Ogdensburgh in New York, through Vermont and New Hampshire, to Boston in Massachusetts, in which one price is paid for transportation through, and the money divided by a standing agreement, as in this case. If goods are carried through on this route, and there are six or seven different contracts, one with each road, then each road must bring a separate action for its share of the freight money. If it should be said that the remedy of the roads is to retain

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the goods at the end of the route till the whole price for transportation through is paid, this, in the first place, would show that these roads are so combined that, for their own purposes, they are a unit, while they insist that they are wholly separate and independent when the owner seeks redress for the loss of his goods. And then again, if the roads act separately, and are not jointly interested in the business of the connected line, when one of the roads parts with the possession of goods by delivery to another, it loses its lien for the freight money, and cannot transfer it to another independent carrier. Angell on Carriers, 357, 359, 609. This is not at all like the maritime lien, when a voyage is broken up and the cargo is put on board another vessel to be carried to the port of destination. There the lien on the cargo for the whole freight is transferred to the second vessel, which completes the transportation under one contract.

The use of steam in carrying goods and passengers has produced a great revolution in the whole business. The amount and importance of it have of late vastly increased, and are every day increasing. The large business between different parts of the country is done, as in this case, by parties who are associated in long continuous lines, receiving one fare through, and dividing it among themselves by mutual agreement. They act together for all practical purposes, so far as their own interests are concerned, as one united and joint association. In managing and controlling the business on their lines, they have all the advantages that could be derived from a legal partnership. They make such an arrangement among themselves as they see fit for sharing the losses, as they do the profits, that happen in any part of their route. If, by their agreement, each party to the connected line is to make good the losses that happen in his part of the route, the associated carriers, and not the owner of the goods, have the means of ascertaining where the losses have happened. And if this cannot be known, there is nothing unreasonable or inconvenient in their sharing the loss, as in case of a legal partnership, in proportion to their respective interests in the whole route.

They undertake the business of common carriers, and must be understood to assume the legal liabilities of that business. They transact the business under a change of circumstances; but the principles and the general policy of the common law, which, as an elementary maxim, holds the common carrier liable for all accidental

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losses, must be applied to these new methods of transacting the same business; and there is certainly nothing in the present condition of the business which calls for any relaxation of the old rule. The great value of commodities transported over these connected lines—the increased risk of loss and damage from the immense distances over which they carry goods—the fact that where goods are once intrusted to carriers on these long routes, they are placed beyond all control and supervision of the owners,—are cogent reasons for holding those who associate in these connected lines to a rule that shall give effectual and convenient remedy to the owner, whose goods have been lost or damaged in any part of the line. Any rule which should have the effect to defeat or embarrass the owner's remedy would be in direct conflict with the principles and whole policy of the common law.

What, then, is the situation of the owner, whose goods have been damaged or lost on a continuous line of three or any larger number of associated carriers, if he can look only to the carrier on whose part of the route the damage may have happened? In the first place, he must set about learning where his loss happened. This would often be difficult, and sometimes quite impossible. Suppose an invoice of flour, shipped in good order at Ogdensburgh, were found, on arrival at Boston, to have been damaged somewhere on the route; or suppose a trunk, checked at Boston for Chicago, was broken open and plundered before it reached Chicago, what would the owner's chance be worth of finding out in what particular part of the route the damage happened? He would have no means of learning himself; and he would not, unless of a very confiding disposition, rely on any very zealous aid in his search from the different carriers associated in the connected line. And if he should have the luck to make the discovery, he might be obliged to assert his claim for compensation against a distant party, among strangers, in circumstances such as would discourage a prudent man, and induce him to sit down patiently under his loss rather than incur the expense and risk of pursuing his legal remedy under the rule set up by these defendants. The forlorn condition of the owner in such a case is put in a strong light by WATTE, C. J., in his dissenting opinion, *Elmore v. The Naugatuck Railroad*, 23 Conn. 478, where he says: "A merchant residing in Cleveland, Toledo or Chicago purchases goods in the city of New York, which he wishes to send to his place of business. He enters into a contract with a railroad company for

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their transportation, not to any given point on the route, but for the whole distance. He delivers the goods to the company, and they are taken and locked up in freight cars. He does not accompany them, and often sees and hears nothing more of them until they are delivered to him at their place of destination. The cars in which they are placed are often run over roads belonging to different companies, to save trouble and expense of change of cars. If the goods are lost or damaged on the route, he ordinarily has no means of determining where or in whose custody the injury occurred. The trouble and expense of ascertaining that fact in many cases would amount to more than the whole damage. As a prudent, cautious man, he would be unwilling to intrust his goods to the custody of others, unless he could find some person or company that would be responsible for their safe delivery." The remarks of SMITH, J. (34 N. Y. 501), before cited, are of the same import, showing the difficulties and embarrassments of the owner, if he can only resort for compensation to the carrier in the connected line on whose part of the route the damage happened.

A rule which throws such difficulties in the way of the owner who seeks to recover of common carriers for the loss of his goods, I cannot but regard as a wide departure from the general doctrine of the common law on this subject; and nothing is plainer than the duty of courts to apply the general principles of the common law to the new circumstances which are introduced by changes in the manner of transacting any business.

Few things are of greater importance to the whole country than the cheap, convenient and safe transportation of goods between distant points. Vast sums of money are expended to promote this object. The business is already immense and constantly increasing. Most of this business is done on connecting lines of railroads and steamboats, and these by continuous lines have a practical monopoly of the business on their respective roads. The owner of goods must intrust them to these associated carriers; they cannot be carried in any other way. Not only those who are engaged directly in carrying and sending goods are interested in this subject; all who produce and all who consume are interested that goods should be carried as cheaply, as conveniently and as safely as possible. Public policy and the public interest concur with the general maxim of the law, that those who transact this great business should be held to a rule which shall give a ready and effectual remedy to the owner

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whose goods have been lost or damaged in any part of these connected lines of transportation.

There is a perplexing diversity of decision on this subject in the different tribunals of this country. For instance, by the law of New York, as we understand it to be established by the construction which the courts have given to their statute, if goods are received in that state for transportation through on a connected line of railroads, the road that receives the goods is liable for loss or damage happening in any part of the connected line, though beyond the limits of the state. *Burtis v. The Buffalo & State Line Railroad, qua supra*. As has been before mentioned, there is a connected line of six or seven railroads extending from Ogdensburgh to Boston. If goods are received by the Ogdensburgh railroad for transportation to Boston, and are lost or damaged on any part of the line, say on the Lowell railroad, the Ogdensburgh railroad is liable for the loss. But if merchandise is received at Boston by the Lowell railroad for transportation to Ogdensburgh over the same connected line of railroads associated under the same agreement, the owner would be left to find out, if he could, on which of the six or seven connected roads his goods were lost or damaged, and could claim for his loss of that road alone. There would seem to be no remedy for this confusion and conflict of decisions unless the national legislature can provide one under the power given by the constitution to regulate commerce.

I come to the conclusion that, on the case stated, the plaintiffs are entitled to recover; and such is the unanimous opinion of the court.

NOTE.—See *Cincinnati, Hamilton & Dayton, & Dayton & Michigan Railroad Company v. Pontias*, post.

 DEMING v. GRAND TRUNK RAILWAY Co., appellants.

(48 N. H. 455.)

Common carriers — Liability for neglect in forwarding goods

The plaintiff having a lot of wool which he had contracted to sell at a certain price, deliverable in B., called upon the agent of defendants, common carriers, and told him that he wished to send it to B. immediately, and that it was sold if it could be forwarded at once. The agent told him that it should

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gr., without fail. The plaintiff delivered it accordingly, but the defendants neglected to forward it for several weeks, during which time it depreciated in value, and on its arrival in B. the purchaser declined to receive it on account of this delay, and the plaintiff was compelled to sell it at a diminished price. *Held*, that plaintiff could recover damages for the depreciation in its market value, and also for the loss of his chance to sell.

THIS was an action of assumpsit.

It was alleged substantially in the first count that the defendants were common carriers, by railroad, from Northumberland, N. H., to Portland, Me.; that plaintiff delivered to them on February 22, 1866, at their depot in Northumberland, a large quantity of wool, of the value of \$5,000, to be transported by them by their railroad thence to Portland immediately and without delay, to wit, by the next freight train over their road, and then to be delivered safely by said defendants to another party, to be thence transported to Boston; that in consideration thereof, and of the freight to be paid by said plaintiff, defendants promised to carry the wool in the manner and at the time above stated, but that in violation of such contract the wool was suffered to remain for some weeks at Northumberland, whereby it was depreciated in value to the extent that it was worth in the market, and plaintiff was obliged to sell it for twelve cents per pound less than he would have obtained for it if the defendants had transported it according to agreement; that at the time of the delivery of the wool to defendants there was a contract, of which defendants were informed, for its sale in Boston at fifty-six cents per pound, but that by reason of the delay of the defendants the party to whom it was contracted to be sold would not accept it, whereupon the plaintiff was compelled to sell it for forty-eight cents per pound; and that plaintiff had been put to one hundred dollars expense by reason of defendants' breach of contract. The second count was similar, except it alleged that the wool was to be carried within a reasonable time after its delivery to defendants.

The substance of the evidence is given in the opinion.

The jury were instructed among other things, substantially, that a contract is binding upon a corporation: 1. If made by an agent authorized in fact to make it. 2. If made by an agent, not authorized to make it, but who has been put by the company in such a position of trust, or has in any manner been so held out by the corporation, as that the other contracting party might reasonably

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believe therefrom, and did believe, that he had authority to make such a contract; and that it was for the jury to determine whether in this case the agent was so held out by the corporation, and, if so, whether such agent had made the contract alleged; and further, that if they found for plaintiff, and that there was a contract for the sale of the wool, and believed that the agent of the company was told that it was so contracted for, and must go forward at once, they might give the plaintiff any damage (over and above the difference in the market value at the time the wool should have arrived, and the time when it did arrive,) which plaintiff had sustained, owing to defendants' delay, by the loss of the chance to sell to the party who had contracted for it; and that they should give interest on this amount from the time such contracting party had refused to take the wool.

They were further instructed that they might allow for plaintiff's expense in looking up the wool, so far as caused solely by, and as the natural consequence of, defendants' delay. The defendants duly excepted.

The jury returned the following informal verdict in the form suggested to them by the court (to be used if they found for plaintiff, and found damages for the items claimed by plaintiff):

"The jury find a verdict for Deming, Baldwin & Wilder, and assess damages for the difference in the market value at five hundred forty-two dollars and eight cents (\$542.08.) They assess further damages beyond the above for loss of chance to sell to Atlantic Delaine company at one hundred and forty-six dollars and ten cents (\$146.10). They assess further damages for plaintiff's expenses to, from and at Boston, occasioned solely by defendants' breach of contract, at thirty-four dollars and seventy-five cents (\$34.75)."

The jury also returned with the informal verdict an affirmative answer to the following question put to them by the court:

"Did Cummings (the company's station agent at Northumberland) make a contract with plaintiff, binding on the railroad company, to forward the wool by the next freight train?"

A formal verdict was taken for plaintiffs for \$722.93, with leave to file a remittitur for any amount which plaintiff may hereafter desire.

Defendants move to set aside the verdict on account of the foregoing exceptions.

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Hibbard & Carpenter, for plaintiffs.

Fletcher & Farr, for defendants.

BELLOWS, J. (after deciding some minor question of practice.)

Another question has respect to the instructions to the jury upon the subject of special damages arising from the loss of the sale to the Delaine company. It is urged by the defendants that such damages could not be included, because no binding contract of sale was shown; but for the reasons already suggested we think the jury might have found a valid contract. The defendants also argue, that, if there had been a valid contract, damages could not have been given for the loss of it. This raises the question whether the carrier of goods which he undertakes to transport is liable, under the circumstances of this case, for damages arising from the loss of a sale when caused by his delay in delivering the goods.

On this point the evidence tended to prove that the plaintiff, having a lot of wool which he had contracted to sell at fifty-six cents per pound, to be delivered in Boston, called upon the defendants' agent at Northumberland station, and stated to him that he had a lot of wool that he had sold or bargained, deliverable in Boston; that he wanted it to go immediately to Boston, and that it was sold if it could go right in; that he wanted it to go by the White Mountains railroad, or by the Grand Trunk railroad, whichever route was the quickest; that he was told by the agent that he would provide two cars for the wool to go by the freight train next day; that the agent told the plaintiff to send up the wool the next morning and it should go without fail. That plaintiff did send the wool the next morning, but that defendants did not forward it until as late at least as March 16th, the arrangement about it having been made on the twenty-first day of February, 1866. The evidence also tends to show that the purchaser declined to take and pay for the wool, assigning, among other reasons, that it had been so long on the way; and the plaintiffs thereupon sold it to other parties at a diminished price.

No objection is made to the sufficiency of the notice that the wool was contracted to be sold deliverable in Boston, and that plaintiffs desired it to be forwarded immediately on that account; and the jury have found that the station agent made an agreement binding on the defendants to forward the wool by the next freight train. U. S. C.

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this testimony we think it was competent for the jury to find that by the breach of the defendants' agreement the plaintiffs lost the sale to the Atlantic Delaine company, and were obliged to sell the wool for a diminished price.

The inquiry, then, is whether for this loss the defendants may be charged. This subject has of late been much discussed on both sides of the Atlantic. The leading English case is *Hadley v. Baxendale*, 9 Exch. 341, where ALDERSON, B., after great consideration, lays it down as a general rule that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself; or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

The action here was against the defendants as common carriers for not delivering seasonably a broken iron shaft sent to the manufacturers as a pattern for another for plaintiffs' mill, and it was held that the plaintiffs were not entitled to damages for the loss of profits while their mill was stopped in consequence of defendants' delay; notwithstanding the plaintiffs' agent told the defendants clerk when the shaft was sent to them that the mill was stopped, and the shaft must be sent immediately, and the clerk replied that it would reach its destination the next day. The opinion of the court was, that this was not notice of such special circumstances as would lead the defendants to contemplate such loss of profits as a natural consequence of a delay in forwarding the shaft, inasmuch as, for aught that was said to defendants, the plaintiffs might have had another shaft; or there might have been other defects in the machinery that would have stopped the mill. The verdict which included such profits was therefore set aside. The court, however, held that if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

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The general doctrine of this case, which was decided in 1854, has been recognized and followed in both the English and American courts, and is regarded as a leading case. Sedg. on Dam. (4th ed.), 81 to 84, notes and cases, and also p. 406, 409. See, especially, cases collected on p. 81. *Copper Company v. Copper Mining Company*, 33 Vt. 92.

In *Griffen v. Colver*, 16 N. Y. 489, 494, the subject was carefully considered and the opinion given by SELDEN, J., who laid it down that the broad, general rule in such cases is that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: "The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain both in their nature and in respect to the cause from which they proceed."

In 2 Kent's Commentaries, 480, in note, it is laid down that "damages for breaches of contract are only those which are incidental to, and directly caused by, the breach, and may reasonably be supposed to have entered into the contemplation of the parties, and not speculative profits or accidental losses, or the loss of a fancied good bargain."

In *Blanchard v. Ely*, 21 Wend. 342, the court recognizes the doctrine laid down in Evans' Pothier (London ed.), 1806, in these words: "In general the parties are deemed to have contemplated only damages and interest, which the creditor might suffer from the non-performance of the obligation in respect to the particular thing which is the object of it, and not such as may have been accidentally occasioned thereby in respect to his other affairs;" and the court quotes the illustrations of Pothier, that, in the case of the failure of title to land demised, the lessor would not be liable for the loss of custom in a business established by the lessee while residing there, although he would be bound to pay the lessee the expense of removal; but that a party may incur liability for intrinsic damages if it appear that they were stipulated for, or tacitly submitted to, in the contract,—as if a party stipulate to deliver a horse in such time that a certain advantage may be gained by reaching a certain place,—when for a default the party shall pay for the loss of such advantage; and as an instance of a tacit submission, the case of demising premises expressly for use as an inn is put, and there it is

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said, that if the tenant is evicted for want of title the loss of custom may be taken into account.

These illustrations furnished by this eminent writer accord substantially with the rule laid down in *Hadley v. Baxendale*, and the provision of the French code, as stated by Sedgwick in his work on damages, p. 67, is also in accordance with that rule. The substance of it is that the "debtor is only liable for the damages foreseen, or which might have been foreseen, from the breach of the contract." And PARKE, B., in *Hadley v. Baxendale*, said that was the sensible rule.

It now must be considered as settled both in the English and American courts, that for the breach of a contract to transport goods, the consignee may recover damages for the depreciation of the goods in market during the delay; that is, the difference between the market price when and where they should have been delivered, and when they were actually delivered. Sedg. on Dam. 75, 78, and 356, 360, and cases; 2 Redf. on Rail. 166; *Griffen v. Colver*, 16 N. Y. 491. And it is obvious that this is in the nature of general damages, as in contracts for the sale of goods, and need not be set out specially in the declaration. See *Collard v. Southeastern Railway Company*, 7 H. & N. 79, cited in Sedg. on Dam. 407, in notes; and see *Stevens v. Lyford*, 7 N. H. 366. The question, then, is whether the consignee may also recover damages for the loss of a sale which he had previously contracted for, and which he communicated to the carrier, when that loss was caused by a breach of the carrier's contract. The authorities very generally agree that the plaintiff can include in his damages only such as are the direct, immediate and natural consequences of the breach of contract; such as flow directly and naturally from such breach, and are not remote, speculative or contingent.

There is difficulty in determining, sometimes, what are, and what are not, the direct, immediate and natural results of the breach complained of. But we think that the decisions which allow, as damages, the difference between the market price of the goods at the time and place when and where they should have been delivered, and the market price when they were in fact delivered, must govern this case.

There it is assumed that if the goods had been delivered to the consignee, according to the contract, they would have been worth to him as much as the then market value, because he could have sold them at that price; and, of course, it is assumed that the injury

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is the direct, immediate and natural result of the carrier's breach of contract. Such an injury must have been foreseen, and in the contemplation of the parties when the contract was made. It would be so equally in the case of a previous sale of the goods, which was communicated to the carrier when he received them, and when the contract was entered into for the express purpose of enabling the seller to complete the sale.

In such a case the loss would be the difference between the price at which the goods were bargained, and the price the consignee was enabled to sell them for in market, and the loss would be the direct, immediate and natural result of the carrier's breach of contract as in the other case.

In the one case the difference in the market price is the measure of damages, because it is assumed that the consignee could certainly have sold them at the market price, had the goods been delivered in due time. In the other case the sale was already made and the price fixed, and had the goods been delivered in due time the consignee would have received that price for them as surely as in the other case he would have obtained the market price; and even more surely, because he might not have chosen then to sell.

The damages for the loss of a sale would fall under the denomination of special damages; and, without notice of the fact of such sale, it could not be understood that such a loss would have been foreseen or contemplated by the parties. It is proper that the carrier should understand the extent of the responsibility he assumes, and the consequence of a failure on his part; and if no special circumstances are communicated to him he ought to be held responsible only for the consequences which might ordinarily be supposed to flow from his breach of contract.

In this case the plaintiff's evidence tended to prove that he informed the defendants' agent that he had a lot of wool that was sold if it could go immediately to Boston, and that if it could not go at once that way he should send it by another railroad; and that the agent told him to send it the next morning, and it should go by the next freight train. Under the circumstances the jury might have found that the contract was entered into for the express purpose of enabling the plaintiffs to complete their contract of sale, and we think the defendants ought to be charged with the loss occasioned by the breach of their contract. *Griffen v. Colver*, 16 N Y. 493.

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In the cases of sales with warranty, or contracts to sell and deliver goods, it is often held that the vendee cannot recover damages for the loss of a contract of resale, arising from the breach of warranty or the failure to deliver the goods. *Clare v. Maynard*, 6 A. & E. 519; *Masterton v. Mayor of Brooklyn*, 7 Hill, 68, and cases cited.

In these cases, however, it does not appear that the contracts were made with any reference to a resale, and therefore they could not come within the principle we have been considering. But a very different case is presented where the contract is entered into for the express purpose of enabling one party to complete a sale, or to obtain some other advantage, and it is so understood by both parties. In this respect the illustrations given by Pothier, before referred to, are in point. In such cases the special damages are deemed to be within the contemplation of the parties.

In the recent English case of *Berries v. Hutchinson*, 18 C. B. (N. S.) 445, which was a contract to sell and deliver to the plaintiff a quantity of caustic soda, which was designed for sale in Russia, and the defendant knew it was designed for a foreign market, and before the time of delivery he knew it was to be sold in Russia, it was held that defendant was liable for the loss of the profits on the resale in Russia caused by defendant's failure to deliver the goods according to his contract, and to the additional cost of freight.

So where defendant had agreed to deliver to a farmer a threshing machine at a time fixed, knowing it was to be used to thresh wheat in the field, and by his failure to deliver it the wheat was injured by the rain, it was held that defendant was liable for the injury, since the parties might well have anticipated such injury to result from the breach of the contract. *Smeed v. Foord*, 1 Ellis & Ellis, 602, cited in Sedg. on Dam. 81, in note; see also cases collected in Sedg. on Dam. (4th ed.) 333, 335; among them, *Randall v. Raper*, 1 Ellis, B. & Ellis, 84 (96 Eng. Com. Law, 82), where defendant sold the plaintiff some barley, warranting it to be "Chevalier seed barley," and plaintiff sold it with similar warranty upon the strength of defendant's warranty, and it proving not to be that kind of barley, it was held that defendant was liable for what plaintiff was bound to pay his vendee. See also *Waters v. Towers*, 8 Exch. (W. H. & G.) 401, and *Woodbury v. Jones*, 44 N. H. 206, and cases cited.

Upon these views we think there was no error in the instructions to the jury in respect to damages for loss of the sale to the Delaine

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company. Nor do we think there was any error in the instructions as to plaintiffs' expenses in looking up the wool. Sedg. on Dam. 359, in note and cases cited, 4th ed. The objection in fact is not urged by counsel.

The instructions in respect to the authority of Cummings were sufficiently favorable to the defendants. He was the station agent at the Northumberland depot, and he testified that he had full charge of receiving and forwarding freight at that station; and although he also testified that his duties in regard to freight were to receive, weigh, fill and get it off as soon as possible, and that he had no authority to make contracts, and no authority over the locomotive power of the road, and that he never agreed to send any freight except live stock at any particular time, we think the jury might legally find that defendants held him out as their agent authorized to contract for sending freight the next day.

This was the subject of the instructions on this point, and we think there was no error. If, for the convenience of the corporation, Cummings was voluntarily placed in a situation of apparent authority, and so held out to the public as competent to make the contract in question, the defendants will be bound, although the agent had in fact exceeded his authority, and even if the defendants were entirely innocent of any purpose to mislead; for when one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract by voluntarily placing the agent in a situation of apparent authority.

In this case the agent was apparently clothed with the sole charge of receiving and forwarding freight at that depot, and it might well be supposed to be within the ordinary scope of his duties to make agreements as to the time of forwarding such freight. If such power was possessed by any one at that depot, it must have been by him, and we think the jury were well warranted in finding as they did.

In 2 Redfield on Railways, 113, it is laid down that station agents who receive and forward freight have power to bind the company that the goods shall be forwarded to a point beyond the terminus of that road before a particular hour, notwithstanding a general notice published that the company would not be liable beyond their own road; and so is *Wilson v. York, New Castle and Berwick Railway*, 18 Eng. Law and Eq. 557; Story on Agency, § 443, 127; *Backman v. Charlestown*, 42 N. H. 125, 131, 133; *Burnside v. Grand Trunk Railroad*, 47 id. 554.

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In respect to the first count, the evidence offered by defendants as to the unexpected rush of freight was properly rejected; and the jury having found a binding contract to carry the wool by the next freight train, the verdict will not be disturbed, even if the evidence were admissible under the second count. When the carrier contracts to carry goods within a prescribed time, no temporary obstruction, or even an absolute impossibility of complying with the engagement, will be a defense to an action for failing to perform his engagement; for when a party by his own contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident or delay by inevitable necessity, because he might have provided against it by his contract. It is otherwise, however, when the duty is created by law. Ang. on Car. § 294, and cases in note. So it is held in 2 Redf. on Rail. 162, in note and cases. The same doctrine is laid down in *Hadley v. Clarke*, 8 T. R. 267, per LAWRENCE, J.

With these views there must be

Judgment on the verdict.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

PEOPLE *ex rel.*, McCAGG *et al.* v. THE MAYOR, ETC., OF CHICAGO.

(51 Ill. 17.)

Municipal corporations—Power of legislature to compel them to incur debt

An act of the legislature for establishing and improving a public park in the city of Chicago, after providing for the appointment of a board of commissioners, with authority to purchase lands, provided further, that, for the purpose of paying for such lands, the bonds of the city of Chicago, to such an amount as should be necessary, should be issued by the mayor, comptroller and clerk of said city, from time to time as the same should be required by the board of park commissioners, and that they should be delivered to said board upon demand. In pursuance of this authority, the board of park commissioners determined that bonds of said city should be issued to the amount of \$500,000, for the purpose specified, and applied to the city officers named to issue such bonds, which they refused to do. On an application to the court for a writ of mandamus to compel such officers to issue and deliver said bonds, *held*, that the legislature had no power under the constitution to compel a municipal corporation to incur a debt for local improvements, without its consent, and that therefore a mandamus would not be granted.

THE questions presented by this record arise on a demurrer to an alternative writ of mandamus, issued on the relation of Ezra B. McCagg, John B. Turner, Joseph Stockton, Andrew Nelson and Jacob Rehm, styling themselves "Commissioners of Lincoln park," in the city of Chicago, and against the mayor, comptroller and clerk of that city, requiring them to show cause why a peremptory writ should not be awarded against them, to compel them, forthwith, to

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execute and deliver to the relators certain bonds of the city, to which they claim to be entitled, in virtue of an act of the general assembly of this state, entitled "An act to fix the boundaries of Lincoln park, and provide for its improvement," approved February 8, 1869.

The act in question is set out in the writ. It devotes certain lands within defined boundaries in the towns of North Chicago and Lake View to the purposes of a public park, to be known as "Lincoln park." All the land within the designated boundaries, belonging to the city, is appropriated without any compensation to the city, and the title to other lands for the same purpose is permitted to be acquired by purchase or condemnation.

A board of commissioners is created, with authority to purchase any of the lands within the designated boundaries, at fair and reasonable prices, to be determined by them, and to be paid for out of bonds or money coming to their hands for the purpose of acquiring title; such lands to be conveyed to and vest in the city, to be used as a part of the park. For the purpose of acquiring land by condemnation, appraisers were to be appointed by the circuit court of Cook county, on application of the board of commissioners.

It is then provided by section 12, as follows: "For the purpose of paying for the land taken for such park under the provisions of this act, the bonds of the city of Chicago, to such an amount as shall be necessary for that purpose, shall be issued by the mayor, comptroller and clerk of said city, from time to time, as the same shall be required by the board of park commissioners, for the purpose aforesaid, and shall be delivered to said board upon demand. And said bonds shall⁴ be payable in twenty years from the date thereof, and shall bear interest at the rate of seven per cent per annum, payable half-yearly, on the first days of January and July in each year; and the said bonds and the proceeds of the sale thereof shall constitute the fund for paying the cost of the lands taken for the park."

By section 14, authority is given the board of commissioners to use these bonds at their par value, by paying any amount which the city shall have become liable to pay for the lands purchased or condemned, or they may sell the bonds at public or private sale, or by subscription, upon such terms as said commissioners shall determine; and power is given to pledge the bonds for money borrowed temporarily, at a rate of interest not exceeding ten per cent per annum, if deemed expedient by the commissioners so to do.

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Section 16 pledges the property of the city and the lands so authorized to be taken for the park, for the payment of the principal and interest of these bonds.

Section 19 places the park under the exclusive control and management of a board of commissioners, to consist of five persons, named and styled "The Commissioners of Lincoln park."

Section 20 appoints the first board of commissioners, to hold office as such for five years, without any compensation for their services, and in case of a vacancy within the five years, the same to be filled by the remaining members of the board, and all vacancies occasioned by expirations of the terms of office, to be filled by the judge of the circuit court of Cook county.

Section 21 gives to this board the exclusive control and government of the park, with power to lay it out and regulate it, and to pass ordinances for its government; to appoint engineers, surveyors, clerks and other officers, except a police force; to prescribe and define their duties and authority; to fix the amount of their compensation, and require bonds for the faithful performance of their duties; and, generally, to possess all the power and authority by law conferred on, or possessed by, the common council of the city in respect to public squares and places in the city, and to vacate any public street or alley within the limits of the park.

By section 3 of an act amendatory of this act, approved March 30, 1869, it was provided, that the common council of the city should not issue, or cause to be issued, nor should any officer of the city execute or negotiate, the bonds of the city for the use of this park to an amount exceeding \$500,000.

These are all the portions of the acts upon which the question arises. North Chicago, South Chicago and West Chicago are regularly organized townships of Cook county, and which together complete the city of Chicago. The town of Lake View is also an organized township, but forms no part of the city.

The alternative writ alleges that the relators accepted the place of commissioners, took the oath and gave the bonds as prescribed by the act; that they met and organized by the election of Ezra B. McCagg, president, and appointed Joseph Stockton secretary, and since their organization they had caused surveys to be made, and had applied for the appointment of appraisers, who were appointed by the circuit court of Cook county; that the appraisers have qualified and entered upon the discharge of their duties, and that the

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relators, as such commissioners, have negotiated with some of the owners for a part of the property embraced within the limits of the park, to procure the title thereof for the city; and have, generally, undertaken to perform the duties enjoined upon them as commissioners by the act, and have paid and become liable to pay several thousand dollars; and that the city of Chicago has, by its proper officers, the board of public works, recognized the relators as the lawful commissioners authorized to take charge of, improve, manage and control this park.

The relators further allege that they had, as commissioners, ascertained from information and from estimates made by them, as well as from negotiations to obtain the lands belonging to private persons, authorized to be taken, that it would require the issue, by the mayor, comptroller and city clerk, of bonds to the amount of \$500,000, to be used for the purpose of paying for the land to be taken, and they determined, and now allege the fact was and is, that bonds to the amount of \$500,000 should be issued immediately for that purpose; and that they acting as such commissioners, by and through their president, E. B. McCagg, did, on the 14th of May, 1869, apply in writing to those officials, at their respective offices, to issue such bonds, which they refused, in writing, to do. And the relations allege, by reason of such refusal they are prevented from acquiring for the city of Chicago, for the purpose of a public park, any of the lands belonging to private persons or corporations, and from enlarging and improving the park, as contemplated by the act, and aver they have no adequate remedy except by mandamus.

M. C. Goudy and Thomas Hayne, for relator:

1. The legislature has full power over municipal corporations. *Cooley's Const. Lim.* 192, 193, 231, 235, 250; *Fild v. People*, 2 Scam. 79; *Mason v. Wait*, 4 id. 127; *People v. Reynolds*, 5 Gilc. 13; *People v. Ottawa*, 48 Ill. 233; *Thomas v. Leland*, 24 Wend. 67; *Town of Guilford v. Chenango*, 13 N. Y. 143; *Kirby v. Shaw*, 19 Pa. St. 258; *Sharpless v. Mayor*, 21 id. 166; *Dunmore's Appeal*, 52 id. 374; *State v. St. Louis County Court*, 34 Mo. 572; *Dayton v. New Orleans*, 12 La. An. 515; *Cheany v. Hoesser*, 9 B. Monr. 330; *Slack v. Maysville & Lex. Railroad*, 13 id. 26; *Nicol v. Mayor*, 9 Humph. 265; *Mayor v. State*, 15 Md. 462; *People v. Mahoney*, 13 Mich. 500; *Montpelier v. East Montpelier*, 27 Vt. 704; *Aspinwall*

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v. *Commissioners Daviess Co.*, 22 How. 377; *People v. Pinckney*, 32 N. Y. 377.

2. The legislature has full control over the property and money of a city, and may direct its use for any purpose consistent with the public good, of which it is the judge. *Cooley's Const. Lim.* 235; *Richland Co. v. Lawrence Co.*, 12 Ill. 1; *Trustees v. Tatman*, 13 id. 30; *Greenleaf v. Trustees*, 22 id. 236; *Springfield v. Power*, 25 id. 187; *Dennis v. Maynard*, 15 id. 477; *The People v. Ottawa*, 48 id. 233; *East Hartford v. Hartford Bridge Co.*, 10 How. 532; *Mayor v. State*, 15 Md. 462; *Montpelier v. East Montpelier*, 27 Vt. 704; *Same v. Same*, 29 id. 19; *State v. St. Louis*, 34 Mo. 572; *People v. Morris*, 13 Wend. 395; *People v. Batchelder*, 22 N. Y. 128.

3. The legislature may create a debt or create a tax without consent of corporate authorities. *Cooley's Const. Lim.* 231; *Dennis v. Maynard*, 15 Ill. 477; *People v. Ottawa*, 48 id. 233; *Kirby v. Shaw*, 19 Pa. St. 258; *Sharpless v. Mayor*, 21 id. 166; *Burrough Dunmore's Appeal*, 52 id. 374; *Thomas v. Leland*, 24 Wend. 67; *Town of Guilford v. Chenango*, 18 Barb. 615; *Same v. Same*, 3 Kern. 143; *People v. Mitchell*, 45 Barb. 208; S. C., 35 N. Y. 551; *Mayor v. State*, 15 Md. 462; *Nicol v. Mayor*, 9 Humph. 266; *People v. Mahoney*, 13 Mich. 500; *Bank of Rome v. Rome*, 18 N. Y. 39.

Storrs & Wilson and *S. A. Irvin*, for respondents:

To the point that the legislature could not compel municipal corporations to incur debt for local improvement against their will, cited *Hampshire v. Franklin*, 16 Mass. 87; *Cheaney v. Hooser*, 9 B. Monr. 338; *Cooley's Const. Lim.* 234, 235; 4 N. H. 566; *Calder v. Bull*, 3 Dall. 386; *Wilkinson v. Leland*, 2 Pet. 627.

BRESEE, Ch. J. (after stating the facts). The alternative writ stands in the place of a declaration in an ordinary action of law, and must show a case *prima facie* good, and, as in ordinary cases, the demurrer brings before the court the whole merits of the controversy. The writ is only to be awarded in a case where the party applying for it shall show a clear right to have the thing sought by it done, and by the persons or body sought to be coerced. *The People, etc. v. Hatch*, 33 Ill. 9.

The important question presented by the demurrer arises upon the twelfth section of the act.

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The relators insist that it is within the constitutional competency of the general assembly to require the issue of these bonds, in the manner indicated in the act, upon the demand of the relators, and that it was not necessary to submit the question of creating such indebtedness to the municipal corporation of Chicago, or to the common council, or to the mayor and comptroller, and is the necessary result of the possession by the legislature of plenary power over municipal corporations, so full and so absolute as to obliterate them altogether should the public exigencies so demand.

The demurrants contend that the requirement of the twelfth section, compelling them to issue the bonds of the city to pay for the land to be taken for Lincoln Park, and to provide for its improvement, is nothing more or less than the imposition of a tax upon all the taxable property within the limits of the city, which the legislature, of itself, without the agency or consent of the city of Chicago, as a municipal corporation, has no constitutional power to impose. It is contended that it is in direct violation of section 5 of article 9 of the constitution of the state, which provides that the corporate authorities of counties, townships, school districts, cities, towns and villages, may be invested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

It is argued by the demurrants, that, by force of this provision, none but the corporate authorities of a city can be invested with the power of assessing and collecting taxes — that municipal taxes can only be assessed and collected for corporate purposes, and they must be uniform with respect to the persons and property within the municipal jurisdiction.

It is also claimed that the corporate authorities of a city are the legislative department of a city government, which department, by the charter of the city of Chicago, is composed of the mayor and two aldermen for each ward, elected by the voters of the several wards, and the argument is, that by this department alone can a tax be imposed for a corporate purpose.

It is further contended, that this section of article 9 is an absolute limitation upon the exercise of the taxing power by the legislature; that it so limits the general powers of that body in relation to municipal taxation that all the legislature can do is to vest the power in the corporate authorities, to be exercised or not, as those authorities may deem expedient.

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We have read with great care the able arguments presented by counsel on both sides, and have examined the cases to which they refer as sustaining their propositions. We have not been furnished with the constitutional provisions of the several states before whose courts these determinations cited have been made, nor do we know wherein they resemble those of this state or differ from them. Some of the cases cited deny to the legislature the possession of the power to compel, against the will of a municipal corporation, its citizens to incur pecuniary obligations to be discharged by taxation, while other cases seem to hold that such corporations are so completely under legislative control that the legislature may compel them to do whatever it may permit them to do, having the general benefit in view.

We do not consider that it is necessary we should attempt to settle these conflicting opinions, as this case does not seem to require it. We are inclined to think, as a mere question of an exercise of the taxing power, it would be very difficult to sustain this law under section 5 of article 9 of the constitution.

In *Harward v. The St. Clair & Monroe Levee & Drainage Company*, a case submitted at the last January term, but in which no opinion has been agreed upon when this case was argued, we held this section was to be construed as a limitation upon the power of the legislature to delegate the right of corporate or local taxation to any other than the corporate authorities, and that by the phrase "corporate authorities" must be understood those municipal officers who are either directly elected by the people to be taxed, or appointed in some mode to which they have given their assent. To what extent it is to be construed as a limitation upon the power of local taxation directly by the legislature itself, it was not necessary in that case, nor is it in this, to decide. However strong the argument in favor of so construing it, there nevertheless may be cases where the legislature, without the consent of the corporate authorities, might impose taxes, local in their character, if required by the general good government of the state, because such taxes would not be merely and only for corporate purposes; as if one of the cities of the state should be insurgent, requiring the interposition of the military power, it will not be denied the state, on quelling the insurrection, could impose taxes upon the city to defray the expense of a resort to military power. So, if the police department of a city should fail to furnish reasonable security to life and property, the state,

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undoubtedly, might provide such force, and assess the city for the expense; but the tax authorized by the act in question is for a purpose purely local and corporate, having no other element about it, and the commissioners appointed by it are, in no sense, corporate authorities of the city of Chicago. They are a mere agency to accomplish the purpose specified in the act, and made to supersede the regularly constituted authorities of the city, to whom, by the charter of the city, had been committed the establishment, control and government of the parks of the city.

Not being a corporate authority^a of the city of Chicago, it cannot be said they are the authority contemplated by the fifth section of article nine of the constitution, in whom the legislature may vest the power of assessing and collecting taxes for corporate purposes. Although no express power is conferred, by this act, upon these commissioners to assess and collect taxes, yet, its equivalent — or what is worse and more oppressive — a power has been conferred upon them to impose a burden upon a small locality, and without its consent, of half a million of dollars, to remove which resort must be had to taxation, to continue for a series of years.

The relators have cited numerous cases as authority in support of the point they make, but they have failed to find a case wherein it has been held that the legislature can compel a city, against its will, to incur a debt by the issue of its bonds for a local improvement. While it is conceded that municipal corporations, which exist only for public purposes, are subject at all times to the control of the legislature creating them, and have, in their franchises, no vested right, and whose powers and privileges the creating power may alter, modify or abolish at pleasure, as they are but parts of the machinery employed to carry on the affairs of the state, over which, and their rights and effects, the state may exercise a general superintendence and control (*Richland County v. Lawrence County*, 12 Ill. 8; *Trustees of Schools v. Tatman*, 13 id. 30), we are not of opinion that power, such as it is, can be so used as to compel any one of our many cities to issue its bonds against its will, to erect a park or for any other improvement — to force it to create a debt of millions — in effect, to compel every property owner in the city to give his bond to pay a debt thus forced upon the city. It will hardly be contended, that the legislature can compel a holder of property in Chicago to execute his individual bond as security for the payment of a debt so ordered to be contracted. A city is made up of indi-

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viduals owning the property within its limits, the lots and blocks which compose it, and the structures which adorn them. What would be the universal judgment, should the legislature, *sua sponte*, project magnificent and costly structures within one of our cities — triumphal arches, splendid columns, and perpetual fountains — and require, in the act creating them, that every owner of property within the city limits should give his individual obligation for his proportion of the cost, and impose such costs as a lien upon his property forever? What would be the public judgment of such an act, and wherein would it differ from the act under consideration?

Although, by section 16, the lands to be taken for this park, and the property owned by the city of Chicago, as a corporation, are primarily pledged for the payment of the bonds demanded, and the interest upon them, ultimately, if the bonds are negotiated, both principal and interest must be paid by the people out of their individual property, should the primary fund be insufficient. This is apparent from this fifth section, which declares that "the general assembly *shall* require that all the property within the limits of municipal corporations, belonging to individuals, *shall* be taxed for the payment of debts contracted under authority of law." These bonds are a debt — it is a debt created under the authority of law, and is an enduring lien upon the property of every individual owner. The debt being created by authority of law, the legislature is compelled to require that individual property shall be taxed to pay it. They have no discretion upon the subject. Here, then, is a case where taxes may be assessed, not by any corporate authority of the city, but by commissioners to whom is intrusted the erection, establishment and control of this park, and this without the consent of the property owners.

We do not think it is within the constitutional competency of the legislature to delegate this power to these commissioners. If the principle be admitted, that the legislature can, uninvited, of their mere will, impose such a burden as this upon the city of Chicago, then one much heavier and more onerous can be imposed,—in short, no limit can be assigned to legislative power in this regard. If this power is possessed, then it must be conceded that the property of every citizen within it is held at the will and pleasure of the legislature. Can it be, that the general assembly of the state, just and honest as its members may be, is the depository of the rights of property of the citizen? Would there be any sufficient security for

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property if such a power was conceded? No well-regulated mind can entertain the idea that it is within the constitutional competency of the legislature to subject the earnings of any portion of our people to the hazards of such legislation.

We fail to perceive any real difference, in principle, in forcing this burden upon the city, and imposing a like burden, by the direct action of the legislature, upon individual property owners within it, for in both cases the debt, at maturity, must be paid by such holders, while the accruing interest is a constant drain upon their resources.

No case, amid the multitude which have been cited by the relators, goes to the extent of this, and with our understanding of the constitution, no warrant is found there for such legislation. Rather than attempt to compel submission to such a law, surely, the alternative should be presented to the city to be deprived of its corporate franchises, for cases, if such legislation is sanctioned, may arise where a city would prefer such deprivation in preference to incurring a debt which might prove greatly detrimental to their prosperity or wholly ruinous.

The respondents are officers of the city, elected by the people of the several wards. They represent the people—they are their lawfully constituted agents, and have refused to issue the bonds demanded. The question is merely local, and no right that we can discover having been acquired under the law, a proper case for our interference has not been made out. If, however, the common council, clothed, as it is by the charter, with power over this whole subject of parks, and with power to direct the issue of bonds, shall pass an ordinance directing the mayor, comptroller and city clerk to issue these bonds, and they should refuse, we might interfere and compel them by mandamus to do the required act, but we cannot on this record, with the views we entertain and have expressed.

There is another view we have taken of this case, to which we will now advert, and which seems to us to settle the question made beyond all controversy.

By section 37 of article 3 of our constitution, the state is prohibited from creating a debt exceeding \$50,000, without the consent of the people, manifested by a vote at a general election, and the law authorizing its creation is required to be published at least three months before the vote is taken, and provision is required to be made at the same time for the payment of the interest annually

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as it may accrue, by a tax to be levied for the purpose, or from other sources of revenue, which law providing for levying such tax is also to be submitted to the people with the law providing for contracting the debt.

So sensibly impressed were the framers of our constitution of the liability of legislative bodies to incur debts, sometimes for objects not entirely praiseworthy or useful, and the hazards, losses and disturbances to which they lead, that they interposed the power of the people at the very threshold to prevent this danger — to tie up the hands of the legislature on this subject — to divest it of a power which dear-bought experience had satisfied the people should not be left unrestrained.

The burden imposed by this law, upon a fractional part of this great state, is tenfold heavier than the legislature can impose upon the people of the whole state, without their previous consent manifested by a vote at a general election. In view of this wise and salutary provision of the constitution, can it be seriously contended, that the legislature can exercise the assumed power to force one and all of the municipalities of this state to incur debts amounting to millions of dollars, by one dash of the legislative pen, for corporate purposes, when, to meet the most urgent demands of the public, and provide for the general welfare, they cannot create a debt against the state exceeding the sum of \$50,000? The proposition is so inconsistent with the spirit and plain intention of this provision that it can receive no favor in this court.

How can we hold, in view of the protection this clause was designed to give the people of the whole state, that the people of a particular municipality can be subjected to a corporate debt, without the consent either of the people to be taxed or of their corporate authorities?

The protection of the whole implies, necessarily, the protection of all its organized parts, and the whole cannot be secure while all or any of its parts are exposed to danger. What is the real value of this provision of the constitution, if the legislature, inhibited from incurring a debt beyond \$50,000 on behalf of the state, may force a debt ten fold or one hundred fold greater, for there is no limit to the power, upon all the cities of the state? We can perceive none. Where these municipalities become so indebted by compulsion of the legislature, the whole state, in its real and substantive, if not in its corporate, body, will, in truth and in fact, be the debtor, for the

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same power of coercion can be applied to counties and towns, and as the state is made up of cities, counties and towns, the whole state may thus become involved. This provision, then, would be no restriction upon the power to create a debt beyond a certain amount, and would fail of its purpose of protecting the state and its citizens from oppressive burdens. Those citizens who are to be affected by the debt should certainly have some voice in its creation, on the same principle that the people of the whole state are to express their consent, by a vote, to the creation of a debt affecting them and their material interests.

We do not, of course, intend to be understood by this reasoning as asserting that the legislature cannot authorize the proper corporate authorities of a municipality to issue its bonds for corporate purposes for more than \$50,000, even without a vote of the people. What we do say is, that an attempt by the legislature to compel a municipality to do this, without either a popular vote or the assent of its duly elected corporate authorities, is not in harmony with the spirit of this provision of the constitution.

This power over municipalities is not to be found in the power conceded to the legislature to alter, modify or abolish their charters. It has no abiding place in the constitution, and we are constrained to say, the legislature in imposing this burden upon the city of Chicago assumed a power which the constitution of the state, in its spirit and true meaning, inhibited them from exercising.

We have been referred to the case of *The City of Ottawa v. The People ex rel. Caton*, 48 Ill. 233, as conclusive in favor of the relators. We do not so understand it. In that case, the question of the constitutionality of the act of the legislature requiring the levy and collection of a tax for the construction of the bridges within the corporate limits of the city of Ottawa was not argued, and was not really presented by the record. The tax had been levied and collected and disbursed in building the bridges, without objection. The act authorizing their construction provided, that, when finished, they should be under the control of the city authorities for the use of the public. They were pivot bridges, and when completed the city refused to take charge of them, or to incur the expense of making them available to the public. A mandamus was allowed to compel them to perform the duty enjoined upon them by the act.

Had the tax payers resisted the levy and collection of the tax, on

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the ground that neither the people of the city, nor the corporate authorities, had assented to its imposition, some analogy might have existed. That case only holds that the city should perform a duty imposed upon it by the act authorizing the construction of the bridges.

Disposing of the main question renders it unnecessary to discuss the question, Are these commissioners officers?

On the whole case, it seems to us one where the city should be permitted to submit to a deprivation of its corporate franchises, instead of being placed under a mandamus by the courts. This alternative, as we have before said, ought in justice be allowed it. If this act of the legislature is sanctioned, the same power can be applied to all our counties, cities, and incorporated towns, and the very consequences produced which it was the object of section 37 of article 3 of the constitution to prevent.

We do not think a case for the interference of this court is presented by the alternative writ, and the demurrer thereto must be allowed and the peremptory mandamus refused.

Mandamus refused.

BEACH v. MILLER.

(61 Ill. 206.)

Covenant against incumbrance—Easement of railroad a breach of.

The owner of a parcel of land through which a railroad ran conveyed the land by a deed purporting to convey the entire parcel without reservations as to the right of way of the railroad. In an action of covenant, *held*, that this right of way was such an incumbrance as would constitute a breach of a covenant against incumbrance contained in the deed.

ACTION for breach of covenant of seisin and against incumbrances. The facts are stated in the opinion.

Williams & Clark and H. N. Knightly, for plaintiff in error.

A. M. Craig, for defendant in error.

WALKER, J. This was an action of covenant brought by plaintiff in error, in the Knox circuit court, against defendant in error,

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to recover damages claimed to have been sustained by reason of an alleged breach of covenants contained in a deed, by which the latter conveyed to the former the east half of the north-east quarter of section 35, in township 11 north, of range 2 east, except four acres in the south-east corner, south of "Middle Prairie road." The covenant contained in the deed, and upon which this action is founded, is this:

"And the said party of the first part, for himself and his heirs, executors and administrators, does hereby covenant to and with the said party of the second part, her heirs, executors, administrators and assigns, that he is well seized of the premises above described, as of a good and indefeasible estate of inheritance in fee simple, and has good right to sell and convey the same in manner and form aforesaid; that the above-described premises are free from all incumbrances, and that the above-described premises, in the quiet and peaceable possession of the said party of the second part, her heirs or assigns, against the claims of all persons whomsoever, he will forever warrant and defend."

Breaches are assigned on each of these covenants, in the usual form. A large number of pleas were filed, and issues joined on a part of them, and demurrers sustained to the others; and a trial was had before the court and a jury, resulting in a verdict and judgment in favor of defendant.

On the trial below it appeared that the defendant in error, on the 27th day of September, 1855, conveyed the right of way across the land described in the deed sued upon to the Peoria and Oquawka Railroad Company. The consideration mentioned is one hundred dollars, but the width of the right of way is not mentioned, nor is it located by description in the deed. But the evidence shows that the road is constructed across this land, and is in use by the company. It also appears that the company claims one hundred feet in width and eighty-one and one-half rods in length across the land. It also appears that the railroad was in the use and occupancy of this strip of land at the time plaintiff purchased, and that he was aware of the fact, but nothing seems to have been said in reference to it at the time or previous to the sale. Plaintiff in error claims that this is such an incumbrance as creates a breach of the covenant against incumbrances, but defendant insists that it is not, and that the action cannot, therefore, be maintained. There is nothing which shows that there was any reservation of this right of way from the

operation of defendant's deed. He conveyed the tract as a whole, except the four acres, which does not apply to this right of way. The deed, by its terms, conveyed all of the lands embraced within the lines of the description, except the four acres it reserved, and this strip passed as effectually by the conveyance as any other three acres in the tract; and the fee to this strip no doubt passed to and vested in plaintiff, as did the balance of the land embraced in the deed. The conveyance to the railroad only purports to convey the right of way, and not the fee to the land. Even if it was capable of taking the fee, the deed does not purport to convey it.

The husband's right to the curtesy is contingent, and until it vests he has no present interest in the land. It does not vest in the husband until the death of the wife, and until he has a present interest he has no right to sue. In this case the land belongs to the wife, and she may, as repeatedly held by this court, maintain an action in her own name when her property has been injured or her rights thereto have been affected. The suit was, therefore, properly brought, as the covenant was to her and the ownership in her.

Was this right of way, then, an incumbrance upon the land? We think it was. It is true, the authorities on this question are not harmonious, but we think the current holds such an easement to be an incumbrance, and that they are supported by the better reason. In the case of *Prescott v. Trueman*, 4 Mass. 627, Chief Justice PARSONS, in delivering the opinion of the court, says: "Thus the right to an easement of any kind in the land is an incumbrance. So is a mortgage. So also is a claim of dower, which may partly defeat the plaintiff's title by taking a freehold in one-third of it." And to the same effect are the cases of *Mitchell v. Warner*, 5 Conn. 497, and *Harlow v. Thomas*, 15 Pick. 68, where it is held that a private way over the land is an incumbrance. A right to go upon the land to clear an artificial water-course has been so held (*Prescott v. Williams*, 5 Mct. 433), and a right to cut timber on land was held to be an incumbrance. *Callicart v. Bowman*, 5 Barr, 319.

In the case of *Kellogg v. Ingersoll*, 2 Mass. 97, Chief Justice PARSONS said, in delivering the opinion of the court, that "the court are well satisfied that the road, as there described, is an incumbrance on the land sold. It is a legal obstruction to the purchaser to exercise that dominion over the land to which the lawful owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable, or merely nomi-

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nal. The amount of damages is a proper subject of consideration for the jury, who may assess them, but it cannot affect the question whether a public town road is an incumbrance of the land over which it is laid."

Where a purchaser acquires the fee to land free and unincumbered, he obtains the absolute dominion over it, and may use and enjoy it by appropriating it to any legitimate use he may choose. But where it is subject to easements it is not free, nor can he enjoy it to its full extent. When incumbered by a private or public way passing over it, he does not have absolute dominion over it, as he would were it not under such servitude. With the easement of a private way the person holding it can use and enjoy it in his own right for the purposes of the way, and the owner of the fee cannot control its use. So of a public highway, the public enjoy the right to its unobstructed use, in defiance of the owner of the fee. Where property is free from such servitudes, the owner may use and appropriate every part of it to his individual and exclusive use, but the portion occupied by such easements is not in any sense under his control in its use and enjoyment, except it be consistent with the enjoyment, and without obstructing those having the easement in its enjoyment.

When a purchaser obtains title by deed without covenants, he of course takes it subject to all defects and incumbrances it may be under at the time of the conveyance. But where a person insists upon and obtains covenants for title, he has the right, when obtained, to rely upon them and enforce their performance or recover damages for their breach. The vendor is under no compulsion to make covenants when he sells lands, but having done so he must keep them, or respond in damages for injury sustained by their breach. Nor is it a release or discharge of the covenant to say that both parties knew it was not true, or that it would not be performed when it was made. A person may warrant an article to be sound when both buyer and seller know it is unsound; so the seller may warrant the quantity or quality of an article he sells when both parties know that it is not of the quality or does not contain the quantity warranted. In fact, the reason the purchaser insists upon covenants for title, or a warranty of quality or quantity, is because he either knows or fears that the title is not good, or that the article lacks in quantity or quality. If he were perfectly

assured on these questions, he would seldom be tenacious in obtaining a covenant or warranty.

If, then, a private or public way is an incumbrance, and we have seen that it is, it follows that, in principle, a turnpike or railway, legally located, and running over a piece of land upon the same ground, and for the same reasons, must be held to be an incumbrance, as it in an equal or greater degree obstructs or incumbers the free use of the land. And a person selling land thus incumbered, and covenanting that it is not, must be held to perform his covenant by its removal, or respond in damages.

We are aware that in Pennsylvania a different rule obtains. But in that state the government and subsequent vendors allow in measurement of land six per cent of the quantity, which the public have a right to appropriate for highways without compensation to the owner.

Such being the case, we should not expect to find their courts holding that a public highway was such an incumbrance as would amount to a breach of the covenant against incumbrances. It is true, the court does not place the decision upon this ground, but it no doubt had its weight with the court.

And it is true, that in New York, in the case of *Whitebeck v. Cook*, 15 Johns. 482, SPENCER, J., in delivering the opinion of the court, expressed a strong doubt whether a public road was such an incumbrance.

In Maine, New Hampshire, Connecticut, Vermont and Iowa, their courts seem to have followed the case of *Kellogg v. Ingersoll*, and are opposed to the doctrine of the Pennsylvania courts.

Although the fee may not have passed by the deed in this case, still the right of user was granted, and that being vested in the railroad company, and they having its exclusive use, it must be held to be an incumbrance, within the covenants of this deed, and, being an incumbrance, it operated as a breach of the covenant, and gives the right of recovery.

But the court below, having acted upon rules not in accordance with the views herein expressed, the judgment of that court must be reversed and the cause remanded.

Judgment reversed.

City of Chicago v. McGinn.

CITY OF CHICAGO, appellant, v. MCGINN.

(51 Ill. 206.)

Bridges over navigable streams — Right of state to build or regulate.

The right of free navigation of a river is not inconsistent with the right of a state to provide means of crossing the same by bridges or otherwise, provided such bridges do not materially injure navigation.

The common council of Chicago, in pursuance of a power granted in their charter, passed an ordinance to the effect that the draws of the bridges over the Chicago river should be closed every ten minutes, if necessary, for the passage of persons or teams, and that any person in charge of a vessel navigating the river who should attempt to pass any bridge, or approach so near as to occasion damage thereto, while the draw was so closed, should be subject to a penalty prescribed. *Held*, that the legislature had power to authorize the common council to regulate the passage of vessels through the bridges, and that the ordinance in question was a reasonable exercise of that authority, and therefore valid.

APPEAL from the superior court of Chicago. The facts are stated in the opinion.

S. A. Irvin, for appellant.

Spafford & McDaid, for appellee.

BREESE, C. J. The question presented by this record arises upon an ordinance passed by the common council of the city of Chicago, entitled "An ordinance regulating the time and manner of vessels, in passing through the swing bridges over the Chicago river and its branches," passed April 22, 1867.

The ordinance is as follows:

Be it ordained by the common council of the city of Chicago:

SEC. 1. That the board of public works of said city be, and they are hereby, required to provide, construct and arrange at the several bridges over the Chicago river and its branches, in the best and most practicable manner, vessel signals, as required by section two of this ordinance.

§ 2. Said signals shall be of material of a red color for use in the day time, and shall be of such size, and so placed, when elevated, that they may be readily seen up or down the river. The signal for

the night time shall be a red lantern, of such size, and so placed and arranged when elevated, as to be seen easily up or down the river.

§ 3. It shall be unlawful for the owner or owners, officers, or other persons in charge of any vessel or vessels navigating the Chicago river or its branches, or any part thereof, to attempt to pass any of the bridges over the said river or its branches while said signal or signals are up or elevated, or to approach so near to any of said bridges at such times as that the same may be injured or damaged, or while the said bridges, or any of them, may be opening or closing.

§ 4. Bridge tenders, or persons in charge of the bridges, shall not close the same against vessels seeking to pass through, until passengers, teams or vehicles have been delayed fully ten minutes by the bridges being open.

§ 5. Whenever, between the hours of six o'clock in the morning and seven o'clock in the evening, persons, teams or vehicles have been delayed at said bridges fully ten minutes, by reason of said bridges being open for vessels to pass, it shall be the duty of the bridge tenders, or other persons in charge of the bridge or bridges, to display said signal, and immediately close the same and keep the same closed for fully ten minutes, for such persons, teams or vehicles to pass over, if so much time shall be required, when the same shall be opened again and kept open (if necessary for vessels to pass) for the like period, and so on alternating (if necessary) during the hours aforesaid.

§ 6. Any person who shall violate any of the provisions of this ordinance, in addition to being chargeable with whatever damage may result to the city by reason of any such violation, shall also be subject to a penalty, for each and every such violation, of one hundred dollars; and in case the same person or persons violate such provisions, or any of them, a second or more times, in addition to the penalty or fine authorized as aforesaid, the court before which the trial is had may also imprison such offender or offenders, not exceeding three months, in the city bridewell or house of correction.

§ 7. It shall be the duty of the harbor master, under the direction and supervision of the comptroller, immediately after this ordinance takes effect, to cause the same to be printed in the form of hand-bills or posters, in such numbers as said comptroller may deem necessary, and distribute the same among the owners, officers and others having charge of tugs and vessels, as far as practicable, and also to the bridge tenders or persons in charge of the bridges.

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§ 8. It shall be the duty of the harbor master, so far as in his power, to see that the provisions of this ordinance are fairly and faithfully observed, and when necessary he shall call on the superintendent of police for aid to enable him so to do.

§ 9. This ordinance shall be in force and take effect from and after its passage and due publication.

The action was brought by the city before the police court for the penalty incurred by a violation of the third section of the ordinance. A judgment was rendered in favor of the city for the penalty imposed by the sixth section, and an appeal taken by the defendant to the superior court of the city, in which court, on a trial by jury, under instructions from the court, a verdict was found for the defendant, and judgment for costs was rendered against the city.

To reverse this judgment, the plaintiff brings the record here by appeal.

The questions presented are, have the common council authority to pass any ordinance regulating the time and manner of vessels passing through the bridges erected over and across the Chicago river, and, if they have this power, is the ordinance above cited a proper and reasonable exercise of the power?

Appellee takes the ground, that the ordinance is void for want of power in the common council, under the charter of the city, to pass it; and, further, if the common council acted in pursuance of the charter, then the charter in that regard is unconstitutional and void, and consequently the ordinance is void.

The points made involve the constitutional power of the legislature over navigable rivers wholly within the limits of this state.

This subject received the deliberate consideration of this court in the case of *The Illinois River Packet Co. v. The Peoria Bridge Association*, 38 Ill. 467, in which the power was affirmed, and nothing has been shown since to induce a change of opinion.

It was there said, the right of free navigation of the Illinois river was not inconsistent with the right of the state to provide means of crossing the river, by bridges or otherwise, provided such bridges do not essentially injure the navigation of the river. The right to navigate them, and the right to cross them by bridges are co-existent, and neither can be permitted to destroy or essentially impair the other. These remarks equally apply to other navigable rivers.

And remarking upon the provision of the ordinance of 1787, that

the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the territory as to the citizens of the United States, and without any tax, impost or duty therefor, it was said there was no restriction on the power of the state, if the ordinance was yet in force, to use the most improved artificial means of crossing those waters. The ordinance only prohibits its obstruction and the imposition of a tax or duty on its navigation. Nothing less than a total obstruction by dams, or other impediments of that nature, would be a violation of its provisions. Navigation upon them would not then be free, for the very current itself would be in custody, and mankind be thereby excluded from its profitable use. That it does not mean that the river and its navigation shall be a common highway, free from all and every condition, but only that it shall be free from obstruction and free from any burden imposed in the shape of a duty or tax.

And in remarking upon the peculiar position of Chicago upon its little river, it was then asked, has any one advanced the idea that those bridges, furnished with capacious draws for the passage of vessels, materially obstruct its navigation, or if they do, have not all yielded to the necessity of their erection? How could the business and intercourse of that great and growing city be carried on without these facilities? and, while the navigation of the river is not subject to tolls or duties, who has a right to complain of these structures?

Some of these questions are answered now, for the first time, by the defense set up in the court below, and urged here, that these bridges are a material obstruction and subject navigation to great delay and peril.

In that case, it was also said that mere delay in passing these bridges, which prudence would advise at unpropitious moments when winds and currents are not favorable, cannot, in our judgment, affix to them the quality of a material obstruction, or of any other description of obstruction, for the erection of which the owners should be liable in damages. It is a matter of necessity that the franchise of navigation should be constrained to meet the exigency, and yield some of its asserted rights for the sake of works of such great public utility.

In addition to what was said in the above cited case, we might say, that neither the Illinois, the Mississippi nor the Chicago rivers

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is a navigable stream in the sense of the common law, which obtains in full force in this state by legislative enactment. No rivers, by the common law, are deemed navigable above the ebb and flow of the tide. The stream above belongs to the riparian proprietors on each side of it, *ad filum aquæ*. *Middleton v. Pritchard*, 3 Scam. 510. The same doctrine was reiterated in the late case of *Ensminger v. The People ex rel. City of Cairo*, 47 Ill. 384.

This being so, the water and the bed of the Chicago river are the property of riparian owners, subject only to an easement in the public, for the purposes of navigation. The fee in the streets of the city have been held by this court to be vested in the corporation. *Canal Trustees v. Havens*, 11 Ill. 554, and to the same point is *Hunter v. Middleton*, 13 id. 50.

Bridges are but streets or highways over water; the fee, therefore, of all such portions of the river as are crossed by bridges is likewise in the corporation, subject to the same public easement. Not only such portion of the river as the bridge actually covers, but so much of it as is measured by the width of the street of which the bridge forms a part.

The river, the soil covered by it, and its banks, for the entire width of the street, being owned by the corporation, in fee, it is competent for them to devote them to any use which, in the judgment of its authorities, shall be deemed most promotive of the public interests, subject only to the easement for navigation, and to that universally accepted maxim, "use your own so that you injure not another."

The power to build the bridges being a necessary power, and expressly granted to the corporation, the power to regulate them, prescribe the time and manner of vessels passing through them, is a necessary incident of the power to erect them. The third section of the ordinance, therefore, is valid.

Want of time forbids our taking a more extended view of the principles which underlie this case, and to show, as we think can be satisfactorily, that, neither under the power granted by the states to congress to regulate commerce with foreign nations and among the several states and with the Indian tribes, nor under any other provision of the constitution, or of any act of congress, has this power of the states over the navigable rivers exclusively within them, to render them useful for their domestic purposes, been surrendered or designed to be surrendered. And in such an effort, we would call

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to our aid the cases of *The Commonwealth v. Breed*, 4 Pick. 460; *The People, etc., v. Rensselaer & Saratoga R. R. Co.*, 15 Wend. 113; *Palmer v. Cuyahoga Co.*, 1 McLean, 226; *Williams v. Beardsley et al.*, 2 Ind. 59; *Wilson v. The Black Bird Marsh Creek Co.*, 2 Pet. 245; *Columbus Ins. Co. v. Peoria Bridge Association*, 5 McLean, 425; *The United States v. The New Bedford Bridge*, 1 Woodb. and Minot, 401, 508; *Gilman v. The City of Philadelphia*, 3 Wall. 713; *Pollard's Lessee v. Hagan*, 3 How. 230; *Martin et al. v. Waddell*, 16 Pet. 410.

The case of *Gibbons v. Ogden*, 9 Wheat. 1, contains nothing adverse to this power of the states over such waters. It is there held, that there was much legislation connected with commerce which the states did not surrender to the general government, such as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., and in this day, it may be added, railroads. Legislation in respect to these can be more advantageously exercised by the states themselves. Roads and ferries are vast aids to commerce, and bridges are for the same purpose as ferries — both are highways over a water-course; and if a ferry over a navigable river, established by state authority, is a proper subject of state legislation, not interfering with the power granted to congress to regulate commerce, so neither can a bridge be so considered, provided it causes no material obstruction to commerce.

The ordinance of the city, now in question, affords equal facilities to land and river commerce, and is obnoxious to none of the objections raised to it.

The court trying this case seems to have entertained views quite different from those here expressed, as appears by the last instruction given for the defendant. It is this:

"The jury are instructed, as a matter of law, that the city of Chicago was not authorized to close said Madison street bridge so as to obstruct the passage of said tug Robert Tarrant, and her said tow Wyandotte, while navigating the Chicago river, by reason of the closing of said bridge; that the said tug Robert Tarrant and her tow were entitled, upon properly signaling said bridge, to have the same opened so as to allow them a free passage through the draw thereof. And the jury are instructed, that if they find, from the evidence, that, upon approaching said Madison street bridge at the date in question, said defendant, by his tug, signaled said bridge for a passage through the draw thereof, and that said bridge was closed

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and remained closed, and materially obstructed the passage of said tug and her tow in their navigation of Chicago river, then the defendant is not liable to any fine by authority of said plaintiff for any collision with said bridge."

This instruction, substantially, tells the jury the city had no right to construct this bridge, and to pass this ordinance regulating the time and manner of vessels passing through it. If they had these rights, as we have said they have, then the defendant could not claim that the bridge should be opened when he made the signal, for when he made the signal to open the bridge the ordinance declared it should be closed, and when closed, it of necessity obstructed the passage of the vessel, but it was not an unlawful obstruction.

For the reasons given the judgment must be reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

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(51 Ill. 286.)

Summary abatement of nuisance.

An ordinance of a town declaring a nuisance all intoxicating liquors kept within the limits of the town for the purpose of being sold or given away as a beverage to be drunk within said town, and directing the police officers to abate said nuisance by removing the liquors beyond the town limits, will not justify such officers in seizing and carrying away liquors until it has been determined by a court of justice that the ordinance has been violated.

THE opinion states the case.

A. E. Stevenson and J. A. Briggs, for plaintiffs in error.

Washington Bushnell, Attorney-General, for people.

LAWRENCE, J. This was an indictment for a riot. The defendants were convicted, and have prosecuted this writ of error.

The record shows the town of Eureka, in Woodford county, had adopted an ordinance declaring a nuisance all intoxicating liquors

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kept within the limits of said town, for the purpose of being sold or given away, as a beverage, to be drunk within said town. The ordinance further directed the police officers to abate said nuisance by removing the liquor beyond the town limits. One Moustier kept a grocery in the town, and, on the 7th of January, 1869, the plaintiffs in error, two of whom were police officers and the rest trustees of the town, proceeded to Moustier's grocery, over which he and his wife lived, and demanded his liquor. He refused to deliver it, whereupon they went up stairs, and finding the door of the room occupied by his wife to be locked, on her refusing to open it, broke it down with a sledge-hammer, or some similar instrument, and taking several kegs of whisky and beer, put them in a wagon and carried them beyond the limits of the town, leaving them on the ground. Moustier testifies he never saw his liquor again.

The plaintiffs in error sought to defend under this ordinance, but the circuit court most properly held such a defense unavailing. Even if the power were conceded to the town, of seizing, carrying away and destroying this man's beer and spirits, if kept for sale to be drunk within the town, as to which we express no opinion, the question not having been argued, yet it certainly cannot be denied, that such a power could be exercised only by some judicial instrumentality. Even under this ordinance, the beer and spirits were not a nuisance liable to summary destruction unless they were kept for sale or gift, to be drunk within the town; and whether they were kept for that purpose was a question which the owner had the right to submit to a court of justice before his property could be taken away. The board of trustees of Eureka had no more power to authorize their police officers to perform acts of this character, than they had to authorize them at discretion to assess a fine of fifty dollars upon any man whom they might believe to keep spirits for sale, and seize his property or person for its payment, without inquiry before a court, or an opportunity of being heard in his own defense. Such proceedings are a violation of the elementary principles of our constitution and laws, and it is unnecessary to enlarge upon this topic. A man's property cannot be seized except for a violation of law, and whether he has been guilty of such violation cannot be left to police officers or constables to determine.

It is urged there was no evidence against Shockley and Houseman, two of the defendants; but the circuit court that tried the case, a jury having been waived by consent, had the right to infer

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from the evidence, that all the defendants were at the grocery with a common purpose.

It is urged that a jury could not be waived, but we know no reason why it may not be in trials for misdemeanors.

The judgment must be affirmed.

Judgment affirmed.

HUGUNIN V. COCHRANE.

(51 Ill. 302.)

Dower — prior lien for purchase price.

Where a husband purchased lands, giving his notes as security for the purchase price, and afterward, by his sole deed, reconveyed the lands to the vendor as a satisfaction of the notes; *held*, that the wife's right of dower did not attach.

THE facts are stated in the opinion.

James L. Stark, for plaintiff in error.

Robert T. Lincoln, for defendant in error.

WALKER, J. It appears, from the record in this case, that John C. Hugunin and Alexander Logan, on the 3d day of April, 1837, purchased of Leonard C. Hugunin the undivided half of lot five, in school section addition to Chicago. The consideration expressed in the deed was \$2,000, for which promissory notes were given by the grantees, and accepted by the grantor. Afterward, on the 20th day of May, 1837, the same premises were reconveyed by John C. Hugunin and Alexander Logan to Leonard C. Hugunin, and he returned their notes to them. Plaintiff in error did not join in the deed reconveying the premises, although she had been married to him in the year 1834, and she was still his wife.

John C. Hugunin died on the 4th day of July, 1866, and plaintiff in error filed her petition for the assignment of dower on the 3d day of June, 1867. An answer was filed, and evidence was heard at the trial, and the court refused the relief and dismissed the bill. The record is brought to this court on error, and a reversal is asked,

because the court below dismissed the bill and refused to assign her dower in the premises. This, then, presents the question, whether, when a vendor, who, when he sells, receives notes for the payment of the purchase-money, and afterward the transaction is canceled by a reconveyance and a return of the notes to the first vendees, the land becomes subject to the dower of the wife of one of the first grantees.

There is no doubt that the husband of plaintiff in error became invested with a dry, naked fee, in law; but there is as little doubt that in equity Leonard C. Huginin held a lien as vendor of the premises. It is true, he testifies he took the notes as payment for the land, and took a reconveyance of the lot to get his pay; that he regarded the makers of the notes as abundantly able to pay for the land. He further says, he was not aware of the fact that the law gave him a lien, and did not design to waive any of his rights by taking the notes for the purchase-money; he took no mortgage or other security. He says he remembers the money troubles of 1837, and this lot must have declined with other property.

In equity, and on the principles of justice, this claim does not commend itself to the favorable consideration of a court of justice. All that can be said is, that plaintiff in error had the mere form of a title, while he, or plaintiff in error, did not pay a farthing for the naked title he held. And as Leonard C. Huginin did no act to waive the vendor's lien, he might have held the notes until their maturity, and then enforced his vendor's lien against the property, to the entire exclusion of any right of dower on the part of plaintiff in error. That lien was superior to her claim of dower, both in law and justice; and had the lien been enforced in a court of equity, whether plaintiff in error was a party or not, the decree and sale would have barred her claim to dower. At the ancient common law, the exchange of lands put the widow upon her election as to which should be subject to her dower; she could not have dower in both. Coke's Litt. 31 b. And yet the husband was seized of both pieces of land; and it was, no doubt, for the reason that it would have been manifestly unjust; and our statute has enacted the same provision.

It has also been held, that, when the seisin of the husband was but for an instant, a woman shall not be endowed. 1 Coke's Litt. id. It has also been held that an agreement by a husband, made before the marriage, to convey, which is enforced after the marriage, the

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widow shall not be endowed, as in such a case the husband is considered as never having been seized during coverture. *Green v. Green*, 1 Ham. (Ohio) 538. Where a husband is seized of an estate to hold in trust for another, it is a familiar rule that the wife shall not be endowed of such estate, although he is manifestly seized of the fee. These authorities are sufficient to establish the fact that there are numerous exceptions to the rule that the widow shall be endowed of all the lands of which the husband was seized of an estate of inheritance, either at law or in equity; and it appears to us that the case at bar is fully within the reason of these exceptions. To allow the widow, in this case, to recover dower, would work manifest injustice and wrong.

Leonard C. Hugunin holding a vendor's lien, which was superior to any lien or right of dower held by plaintiff in error, its foreclosure was like a purchase, and the giving of a mortgage on the premises to secure the purchase-money, as in such a case a foreclosure bars the wife's dower; and it is because the right of the widow to dower is subordinate to the vendor's lien for the unpaid purchase-money. *Warren v. Van Alstyne*, 3 Paige, 513. In Story's Eq. Jur. vol. 2, § 1225, it is said that the lien attaches, where the purchase-money has not been paid, against the vendee, and all persons claiming as volunteers, or with notice under him; and as this lien did exist, and the land was reconveyed for its extinction, and to obtain a release from the payment of the purchase-money, we have no hesitation in holding that it passed free from the dower of the wife.

We are not prepared to hold that a case might not occur where such a conveyance might operate as a fraud upon the wife's right to dower, but we are satisfied that such was not the case with this conveyance. We see no purpose of such a fraud, but, on the contrary, the reconveyance seems to have been made in good faith to cancel the notes and relieve the parties from their payment.

For these reasons the decree of the court below is affirmed.

Decree affirmed.

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CHICAGO & ALTON RAILROAD COMPANY, appellant, v PONDROM.

(51 ILL. 383.)

Railroads—Negligence—Injury to arm projecting from window.

THE plaintiff, while traveling in defendants' railroad car, permitted his arm to rest on the window-sill and slightly project outside, whereby his arm was broken by coming in contact with a freight car standing near the track. *Held*, that the negligence of the defendants was gross in comparison with the plaintiff's, and that the latter could recover.

THE appellee was a traveler on appellants' road, from Bloomington to Chicago. While *en route* through the latter city, the appellee's arm was broken by coming in contact with one of the cars of a freight train standing near the track. The arm was at the time resting on the base of the window, but the evidence was not conclusive as to whether or not it projected beyond, and outside. The appellee swore that it did not, but that it was caught by some projection from the car.

WALKER, J. (after stating the facts, and commenting on the evidence as to the position of the arm, continued):

While at most we may, with the facts we have before us, be able to do no more than to arrive at a reasonable conclusion, still it appears to us that the most natural and probable theory is, that appellee had his elbow resting on the window sill, with his arm extending outward and upward, and, in passing the rear end of the freight train, it was so near the passenger car that his wrist came in contact with the corner of the rear car; and if the speed was sufficiently rapid, the force would be so great that the arm would not be readily withdrawn, and as the pressure increased it would not only force the arm back until it was broken, but it would render the slipping of the arm so difficult, that as it dragged past, it would most likely produce rents in the sleeve, at the place and of the shape found to have been made in the coat sleeve. This, we think, was the manner in which the injury most probably occurred. This, to us, seems reasonable and satisfactory.

The question then arises, whether, having the arm casually outside of the car in that manner was negligence, and if so, was there greater negligence in the company in permitting its freight cars to

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stand so near the track as to produce the injury in the manner we suppose it occurred; and if both parties were guilty of negligence, was that of appellee relatively slight when compared with that of appellant? For a passenger to allow his arm to rest on the window sill and slightly project beyond the outside surface of the car may be, in some degree, negligence, but observation teaches that to do so is not uncommon with passengers. It is frequently done through inadvertence, and, when done intentionally, it is upon the supposition that all railway companies have their track free from obstructions, and that they permit nothing to remain so near to the track as would render it dangerous to permit the hand to pass a few inches beyond the outside of a car window.

We have been referred to a number of cases in other courts, and the earlier cases decided in this court, as announcing the rule, that where there is contributory negligence, the plaintiff cannot recover. The established doctrine of this court is, that where the negligence of the plaintiff is slight as compared with that of the defendant, a recovery may nevertheless be had. We are fully aware this is apparently opposed to the decisions of some courts, but it is more apparent than real, as recoveries are permitted in those courts where acts of the plaintiff should be regarded as slightly negligent, not equal to ordinary care; and by requiring the greatest possible precaution on the part of the carrier.

In the case of *Spencer v. The Milwaukee & Prairie du Chien R. Co.*, 17 Wis. 487, a case very similar in all of its material facts to the case at bar, the court say:

“When we consider the manner in which railroad cars are usually constructed—with windows so that they can be opened, and arranged at a sufficient height from the seat so that passengers will almost unconsciously place their arms upon the sill for support—there being no bars or slats before the window to prevent their doing so—then to say that if a passenger’s arm extends the slightest degree beyond the outside surface, he is wanting in proper care and attention, and if an injury happens he cannot recover, because his conduct must have necessarily contributed to the result, appears to us to be laying down a very arbitrary and unreasonable rule of law.

“It is probably the habit of every person, while riding in the cars, to rest the arm upon the base of the window. If the window is open, it is liable to extend slightly outside. This we suppose is common habit.

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"There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so, to accommodate the motion of the car.

"Passengers know this, and regulate their conduct accordingly: they do not suppose that the agents and managers of the road suffer obstacles to be so placed as to barely miss the car while passing. And it seems to us almost absurd to hold that in every case, and under all circumstances, if the party injured had his arm the smallest fraction of an inch beyond the outside surface, he was wanting in ordinary care and prudence."

In the case of *Laing v. Colder et al.*, 8 Penn. St. 479, it was held, that a person traveling on a railroad car, who permitted his hand to extend outside of the window, and thereby had his arm broken in passing a bridge, could not recover if the agents of the company had given timely notice of the danger which the plaintiff might have avoided. It will be observed, that this case turns upon the fact that notice had been given to the passengers not to put his hand outside of the window. Had the notice not been given, we may infer the court would have held the company liable.

In the case of *The New Jersey Railway Co. v. Kinard*, 9 Harris, 203, the same court say, that "A carrier of either goods or passengers is bound to provide a carriage or vehicle, perfect in all its parts; in default of which he becomes liable for any loss or injury that may be suffered, provided it happen without negligence or misconduct on the part of the party injured. A carrier of passengers is bound to omit no precaution that may conduce to their safety. He is bound to guard against every apparent danger that may beset them. The dangers incident to traveling in railway cars are few in comparison with those incident to other modes of travel; but the most prominent of them is the risk of injury to limbs stuck out of windows, where the cars are not so constructed as to prevent it. Any one who has traveled by railway must have observed that even the most careful passengers forget the risk, and unconsciously suffer their elbows to slip out beyond the window sill. What can a carrier do to prevent it? No more is required than a few metallic rods set in the windows perpendicularly or horizontally, or a netting of wire work, or even wooden slats. None of these would materially impede the circulation of the air, or abridge the comfort of the passengers, while it would make their safety sure. A car without any of these appliances is, to coin a phrase, not road-worthy, and a car-

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rier is responsible for any loss that may happen from that cause alone. Risking his passengers in an unsafe car, it behooves him to use every means in his power to guard against danger from it at dangerous places, by audibly proclaiming in the car the necessity of keeping arms and heads inside. Should any one disregard such warning, he would incur the charge of willful neglect of his own safety, and where there is negligence on both sides, neither party is answerable for any injury from it."

We are aware that this last case has been overruled by the case of *The Pittsburg and Connelsville Railroad Co. v. McClurg*, Law Reg. for March, 1868. But we think the former case the better considered of the two, and to be based on sounder reasons and more in harmony with the analogies of the law, and entitled to more weight.

But even if it were to be conceded that it was negligence on the part of appellee to have had his arm outside of the car window, should he be precluded from a recovery? Was it negligence on the part of the railway company to permit cars or other heavy or permanent bodies to stand so near their track that cars in motion must pass within a few inches of such bodies? We suppose it to be a clear and undeniable duty of a railway company to keep its track clear of such obstructions, and a failure to do so is gross negligence. With such objects so nearly in contact with cars running at a high rate of speed, life must necessarily be greatly endangered; and when such negligence as appellee may have been guilty of is compared with the negligence of permitting a freight train to stand so near the track of a passenger train as to produce the injury which did occur, the former is slight and the latter is gross. And it has long been the settled law of this court in such cases to compare the negligence of both parties, and even if the plaintiff is guilty of negligence which is slight, as compared with that of the defendant, he may recover. *Galena and Chicago Union R. R. Co. v. Jacobs*, 20 Ill. 478; *Chicago and Rock Island R. R. Co. v. Still*, 19 id. 499; *St. Louis and Alton R. R. Co. v. Todd*, 36 id. 409; *Chicago and Alton R. R. Co. v. Hogarth*, 38 id. 370. These cases, besides a large number of others in our court, announce the rule, and notwithstanding other courts have adopted and acted upon a different rule, we regard it as firmly established in this state.

But even under the ordinary rule there are authorities of weight which would justify us in holding that the protrusion of appellee's hand through the car window was not negligence, and that permit-

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ting the freight cars to stand so near the track for the passenger cars was gross negligence. In the case of *Spencer v. The Milwaukee and Prairie du Chien Railroad Co.*, 17 Wis. 493, it was held, where a passenger, while the train was passing over a bridge, had his hand outside of the car window, and it came in contact with a brace in the bridge, which had become loosened and dropped downward, and the hand was injured, there was not negligence on the part of the plaintiff, while there was on the part of the company.

An examination of the instructions given in this case shows that the rules announced and applied by this court, in reference to negligence, were fairly stated to the jury, and could not have misled them; and the evidence sustains the verdict.

The verdict found and returned by the jury was, no doubt, excessive, but the court below required appellee to remit all but \$2,500, or he would grant a new trial. This appellee did, and the court rendered judgment for that sum. While the verdict, after the *remittitur* was entered, was still large, we are not prepared to say that it is so far excessive as to require the judgment to be reversed. It is not so large as to strike us that it could only be the result of passion, prejudice or mistake.

The judgment of the court below is affirmed.

Judgment affirmed.

LANTRY, appellant, v. LANTRY.

(51 Ill. 456.)

Statutes of Fraud — Trust by parol.

If A. voluntarily conveys land to B., the latter having taken no measures to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C., the case falls within the provision of the statute of frauds requiring trusts to be expressed in writing, and a court of equity will not enforce the parol promise.

THIS was a suit in chancery brought by Bernard M. Lantry, the appellee, to enforce an alleged parol trust.

Bushnell & Avery, for appellant.

O. C. Gray, for appellee.

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LAWRENCE, J. The courts have gone a long way toward repealing the statute of frauds, but we think not far enough to sustain the decree rendered in this case.

The facts are very brief. The appellee, Bernard M. Lantry, was the son of John Lantry, deceased, by a divorced wife. He was born soon after the divorce, and never lived with his father. In the fall of 1859 John Lantry, anticipating his own speedy decease, conveyed to his brother, Thomas Lantry, his farm of eighty acres, by an absolute deed. Thomas Lantry swears there was no money consideration paid for the deed, but his brother expected to be taken care of, as he was ill, and told Thomas, in reply to a question whether the boy was not to have something, to do as he pleased. "If the boy is worthy, give him what you please; if not, never look at him." Thomas has given appellee \$320 with which to purchase a team. On the other hand, various witnesses testify that John Lantry, before he went from La Salle county, where he resided, to his brother's house at Chicago, expressed the intention of deeding the farm for the benefit of the boy, and applied to one or two of them to take the trust. Some admissions, rather general in their character, are also proven against Thomas Lantry.

The fourth section of the statute of frauds is as follows:

"All declarations or creations of trusts or confidences, of any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of no effect; *provided*, that resulting trusts, or trusts created by construction, implication or operation of law, need not be in writing, and the same may be proved by parol."

It is not pretended that the alleged trust in this case is a resulting trust, or one created "by construction, implication or operation of law." It is clearly within the language of the act, and is not denied to be so; but it is said this is one of those cases in which courts decline to apply the statute, because to do so would protect a fraud. There is a large number of cases of this character. Those which most nearly approach the case at bar are cited in Hill on Trustees, p. 151, notes (3d Am. ed.), and in 1 Story's Equity Jurisprudence, section 256 (8th ed.) The same cases are cited by both authors, and also by the counsel for appellee. The text in Hill, in support of which the cases are referred to, is as follows: "Where a person, by means of his promises, or otherwise by his general con-

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duct, prevents the execution of a deed or will in favor of a third party, with a view to his own benefit, that is clearly within the first head of frauds, as distinguished by Lord HARDWICKE, viz.: that arising from facts or circumstances of imposition; and the person so acting will be decreed to be a trustee for the injured party to the extent of the interest of which he has been thus defrauded."

The language of Story, *ubi supra*, is as follows: "In the next place, the fraudulent prevention of acts to be done for the benefit of third persons. Courts of equity hold themselves entirely competent to take from third persons, and *a fortiori* from the party himself, the benefit which he may have derived from his own fraud, imposition or undue influence, in procuring the suppression of such acts."

It will be observed, the language of these authors is carefully confined to cases where the party against whom the parol trust is established has prevented the grantor, by fraudulent promises, from adopting some other mode of accomplishing his purpose which he was about to adopt, and induced him to place it in the power of such party to convert the property to his own use. This is the exact limit of the cases cited. Thus, where a husband of the tenant in tail in remainder, by force and management, prevented the tenant in tail *in esse*, who was on his death-bed, from suffering a recovery for the purpose of providing for other parties out of his estate by will, Lord THURLOW held, the estate was to be considered as if the recovery had been suffered. *Luttrell v. Olmins*, 11 Ves. 438, and 14 id. 290.

So, where the issue in tail promised his father, the tenant in tail, to provide for the younger children out of the estate, and thereby prevented his father from suffering a common recovery for that purpose, equity will compel a performance of the promise. *Devenish v. Baines*, Prec. Ch. 4. So where an heir or residuary legatee prevents a gift of a legacy by promising to pay it. *Chamberlaine v. Chamberlaine*, 2 Term, 34; *Oldham v. Lichfield*, 2 Vern. 506; *Mestaer v. Gillespie*, 11 Ves. 638; *Thynn v. Thynn*, 1 Vern. 296; *Podmore v. Gunning*, 7 Sim. 644.

It will be observed that in all these cases there is something more than the mere receipt of the title to real estate, with a parol promise to hold it, subject to a trust. There is an interference with the owner of the property, by means of which he is induced to forego the execution by himself of his designs for the benefit of a third per-

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son, and to leave the execution to the party deluding him by a false promise, and, through such false promise, obtaining title to the property.

The cases are reviewed by Chief Justice GIBSON, in *Hoge v. Hoge*, 1 Watts, 213, and the rule is laid down, that, in order to create the trust, there must have been some fraud, active or passive, in procuring the deed or devise—the mere breach of a promise to convey is not sufficient.

So, in *Perry v. McHenry*, 13 Ill. 236, this court said: “If the refusal to comply with a parol agreement constitutes such a fraud as to take a case out of the statute, then no case is within it; for a party has only to allege that a person contracting by parol fraudulently refuses to comply with the terms of his parol agreement, which he must do in every case, or there would be no necessity for resorting to a court of equity to enforce it, and a case is made to which the statute does not apply.”

The distinction is this. If A. voluntary conveys land to B., the latter having taken no measures to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C., the case falls within the statute, and chancery will not enforce the parol promise. But if A. was intending to convey the land directly to C., and B. interposed and advised A. not to convey directly to C., but to convey to him, promising, if A. would do so, he, B. would hold the land in trust for C., chancery will lend its aid to enforce the trust, upon the ground that B. obtained the title by fraud and imposition upon A. The distinction may seem nice, but it is well established. In the one case, B. has had no agency in procuring the conveyance to himself. In the other he has had an active and fraudulent agency. In the one case, he has done nothing to prevent a conveyance to the intended beneficiary. In the other he has, by false promises, diverted to himself a conveyance about to be made to another.

Giving to the evidence all that can be claimed for it, the present case only comes in the first category. There is not a particle of evidence tending to show that Thomas Lantry ever uttered a word to induce the conveyance from his brother to himself, or to prevent a conveyance from his brother to appellee. On the contrary, the evidence indicates that John Lantry at no time intended a conveyance directly to his son; and conceding to the evidence its utmost

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effect in favor of appellee, it appears John Lantry went to Chicago and asked his brother to accept the trust.

But, apart from the difficulty created by the statute, the evidence is extremely unsatisfactory, and the rule is, that even in that class of cases in which a trust can be established by parol, such evidence is not regarded with favor, and the court will not act upon it if it be not strong and irrefragable, or if it be contradicted by other testimony. Hill on Trustees, 167, and cases cited in notes. The evidence in this case shows merely what intentions John Lantry expressed before he went to Chicago — which he may have wholly changed — and some very indefinite statements testified, by one witness, to have been afterward made by Thomas Lantry. There is no direct evidence that he ever made even a parol promise to hold the property in trust, and he denies, in his own testimony, that he ever did.

To the account put in evidence showing his expenses in regard to the land we can attach no material consequence. It is consistent with his own statement that the land was deeded to him by his brother to be used, so far as he might deem advisable, for the benefit of the boy, and no further.

The decree must be reversed and the cause remanded.

Decree reversed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

STATE *ex rel.* LAKEY, appellant, v. GARTON.

(23 Ind. 1.)

Stamps on official bonds — Limitation of national power of taxation.

Congress has no power to impose a stamp tax upon official bonds given to a state by its officers.

ACTION on an official bond. The case is stated in the opinion.

J. Morris, L. M. Ninds and R. S. Taylor, for appellant.

RAY, J. This action was upon the official bond of Nathan DeHaven, sheriff of Wells county, for a violation of official duty. No service of process was had upon the sheriff, and the suit was dismissed as to him. The sureties answered separately in three paragraphs. The first was a denial of the complaint. The second, that each surety signed upon the express condition and stipulation stated to the said DeHaven, and agreed upon by him, that he would procure twelve other names of as responsible men as there were in that county, to execute said bond as co-sureties with the defendants, which he had failed to do, and that said bond, executed September 23d, 1863, had never been acknowledged.

A demurrer was filed at the August term, 1865, to the paragraph of the answer, which was overruled by the court. As the case of *Deardorff v. Foresman*, 24 Ind. 481, decided at the November

term, 1865, of this court, and the cases of *Blackwell v. The State*, 26 id. 204; *Webb v. Baird*, 27 id. 368, and *The State ex rel. McCarty v. Pepper*, 31 id. 76, have required this court to consider fully the question involved, we will not again enter upon its discussion. The demurrer should have been sustained. No acknowledgment of the execution of the bond was required by any law of this state then in force.

The third paragraph of the answer alleged that a revenue stamp had never been affixed to the bond.

Under the act of June 30, 1864, "to provide internal revenue to support the government," etc. (chap. 173, sess. 1st of 38th cong.), it was provided by section 158, "that any person or persons who shall make, sign or issue any instrument," etc., "without the same being duly stamped," etc., "with intent to evade the provisions of this act, shall, for every such offense, forfeit," etc., "and such instrument * * * shall be deemed invalid and of no effect." Under this section it was held, that unless there was an averment that the omission was from an intent to evade the act, the plea was not good.

By the act of July 13, 1866, this section was amended so as to read, "and such instrument, not being stamped according to law, shall be deemed invalid and of no effect."

The plain intent of this amendment was to avoid the effect of the rulings which held the instrument valid unless the intent existed to violate the act; and under this amendment the person who omits the stamp may not be liable, and yet the paper itself will be void, because "not stamped according to law." This change in the language of the act seems to have been overlooked in the recent case of *Vorsbeck v. Roe*, 50 Barb. 302.

The ninety-fifth section of the act of July 1st, 1862, which was in force when this bond was executed, with a change of schedule by the act of March 3, 1863, declared the instrument unstamped to be "invalid and of no effect." Under such a provision, it cannot be held that the question may not be presented by plea, or that the plea must aver an intent to evade the act of congress. If the instrument be absolutely "invalid and of no effect," no suit can be maintained upon it; and certainly an answer which avers facts which prove this invalidity would constitute a good defense to an action upon it.

Under these considerations, counsel have pressed a question of such gravity that we would willingly avoid its discussion, were we

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not required by official duty to meet it and dispose of it upon as full an examination as our time, limited by the pressure of an overburdened docket, will permit—a question that involves the lining of the limit, under the constitution of the United States, to the power of congress to influence by its legislation the harmonious working of the machinery of a state government.

If a state is to exist as a sovereign, it must of necessity have the power to select its agents to execute its laws, and must be empowered to exact from them such pledge for the faithful discharge of their duties as may seem best calculated to secure their performance. In exacting such security, it must be as independent of all control as in enforcing the condition of the bond when forfeited.

The supreme court of the United States has declared the limit to state taxation, so far as the interests of the general government are involved. A state may not tax a bank of the United States, because the bank is to be considered an agency of the national government in the accomplishment of its constitutional purposes. "That the power to tax," says Chief Justice MARSHALL, "involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied." *M'Culloch v. Maryland*, 4 Wheat. 316.

The power to tax involves the power to destroy, because, in the language of this eminent jurist, it is "unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power." The rule has received almost universal recognition. *Kirby v. Shaw*, 19 Penn. St. 258; *Sharpless v. Mayor*, 21 id. 147; *Weister v. Hade*, 52 id. 474; *Wingate v. Sluder*, 6 Jones (N. C.), 552; *Herrick v. Randolph*, 13 Vt. 525; *Armington v. Barnett*, 15 id. 745; *Thomas v. Leland*, 24 Wend. 65; *People v. Mayor*, 4 N. Y. 419; *Portland Bank v. Apthorp*, 12 Mass. 252.

Again, the states may not tax the obligations or evidences of debt issued by the general government upon the loans made to it, because such tax would trammel the operations of the government in negotiating loans. *Weston v. Charleston*, 2 Pet. 449; *Bank of Commerce v. New York City*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200; *Van*

Allen v. Assessors, 3 id. 573; *People v. Commissioners*, 4 id. 244; *Bradley v. People*, 4 id. 459.

Nor may a state tax an officer of the general government for his office or its emoluments, since such a tax, having the effect to reduce the compensation for the services provided by the act of congress, would, to that extent, require from the national treasury an increased expenditure to secure the execution of its laws. *Dobbins v. Commissioners of Erie Co.*, 16 Pet. 435.

And has this principle, vital indeed to protect the national life, no other application? The benefit of its application has been boldly claimed by the men who have honored the highest judicial positions the nation could bestow on intellect, learning, and virtue. It has protected the one from the hostile action of the many. May not its protection also be invoked to secure the many from an unauthorized exercise of power by the one? Is not the existence of the state governments as fully recognized in the constitution of the United States as that of the national government? If the states may not exercise a power which might menace the general government, should not that hand also be held back from the throat of the former, though the pressure be at present ever so slight?

True, the national government is our government, and we will not anticipate an attempt by it at our destruction as a state, but, as the chief justice remarked in discussing this very question in *M'Call v. Maryland*, this "is not a case of confidence."

"If," continues the chief justice, "we apply the principle for which the state of Maryland contends, to the constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the states. * * * If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government."

And may we not respond, that if the national government may tax — nay more — may declare "invalid and of no effect," the official bond executed to the state from its own citizen selected by it to execute its own laws, may the national government not also tax the

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issue of a warrant from the state auditor upon the state treasurer, the signing of a pardon by the governor, his approval of a bill, the passage of the very bill itself by the legislature, the decisions of our judges, the process of our courts? Nay, it did tax that process. This, then, "is not a case of confidence," but of construction of a constitution which is over and above both national and state governments.

The first clause of the eighth section of the first article of the constitution of the United States declares, that "Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States."

The word "tax," as here used, includes all contributions imposed by the government upon individuals for the service of the state. Story Const. § 950.

This power to tax is not exclusive in the national government. A concurrent and co-extensive power remains in the states, as a part of their "original and unsundered sovereignty," except as to duties on imports and exports. "The authority is coequal." Federalist.

"It will at once be seen," says Judge STORY, "that the state governments have complete means of self-protection; as, with the sole exception of duties on imports and exports (which the constitution has taken from the states, unless it is exercised by the consent of congress), the power of taxation remains in the states, *concurrent* and *co-extensive* with that of congress. The slightest attention to the subject will demonstrate this beyond all controversy. The language of the constitution does not, in terms, make it an exclusive power in congress; the existence of a concurrent power is not incompatible with the exercise of it by congress; and the states are not expressly prohibited from using it by the constitution. Under such circumstances the argument is irresistible, that a concurrent power remains in the states, as a part of their original and unsundered sovereignty." 1 Story Const. §§ 940, 941, 942; Federalist, No. 32; *Gibbons v. Ogden*, 9 Wheat. 191 to 202; 1 Kent Com. lec. 18; 4 Wheat. 193; 5 id. 22; 12 id. 448.

"Any separation of the subjects of revenue which could have been fallen upon would have amounted to a sacrifice of the interests of the Union to the power of the individual states; or to a surrender of important functions by the latter, which would have removed

them to a mean, provincial servitude and dependence." Story Const. § 943.

The jurisdiction of the state on the subject of taxation for state purposes is supreme, over which the government of the United States can have no power or control. *The People v. Bradley*, 39 Ill. 130.

This power of taxation, existing alike in the general government and in the states, co-extensive and concurrent, by virtue of the sovereignty of each, has, then, for each this limit: neither may tax, because neither may take away, the legitimate machinery or agencies employed by the other in the exercise of its governmental powers and functions.

The principle which operates as a limitation upon the power of the state to tax the agencies and minute machinery employed by the general government to carry out its constitutional functions, must in turn equally restrain the power of congress to tax, to trammel or destroy the means used by the state to perpetuate an existence as sacred under the constitution as the national life, because a constituent of that life.

Nor is this conclusion the result of admitted premises alone. A writer on constitutional limitations whose official position, as well as the evident candor and ability manifest in his work, entitles his comments to consideration, reaches a conclusion thus expressed: "If the states cannot tax the means by which the national government performs its functions, neither, on the other hand, and for the same reasons, can the latter tax the agencies of the state governments." Cooley Const. Lim. 483.

In the case of *Fifield v. Close*, 15 Mich. 505, this language occurs: "The same supreme power which established the departments of the general government determined that the local governments should also exist for their own purposes, and made it impossible to protect the people in their common interests without them. Each of these several agencies is confined to its own sphere, and all are strictly subordinate to the constitution, which limits them, and independent of other agencies, except as thereby made dependent. There is nothing in the constitution which can be made to admit of any interference by congress with the secure existence of any state authority within its lawful bounds. And any such interference by the indirect means of taxation is quite as much beyond the power of the national legislature as if the interference were direct and

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extreme." See, also, *Jones v. Estate of Keep*, 19 Wis. 369; *Union Bank v. Hill*, 3 Cold. (Tenn.) 325; *Warren v. Paul*, 22 Ind. 276.

In *Dobbins v. Commissioners of Erie Co.*, *supra*, the argument against the right of a state to tax the salary of an officer of the United States is, that under the constitution the general government has the right to employ its officers and agents to execute its laws and fix their compensation for the discharge of those services, and that this, being a sovereign power, cannot be controlled by the state. So the state has, under the same constitution, the right to perpetuate itself; to employ its officers to execute its laws; and fix their compensation. In this it acts, under the constitution, as a sovereign, and subject to no other control.

Again, it is said the taxation of the office or its salary is in effect a tax upon the United States government. If so, a tax upon the official bond executed by the state officer is to that extent a tax upon the state, and congress can only impose such a tax by apportionment "among the several states which may be included within this Union, according to their respective numbers." Const. art. 1, § 2.

True, the amount exacted is small; so it was in the case of the government officer whose office was appraised for taxation. But the power to exact one dollar involves the power to levy one thousand. The power to tax involves the power to destroy.

The purposes for which taxation may be levied by the national government are expressed, and are a limitation upon the power.

Mr. Jefferson says: "To lay taxes to provide for the general welfare of the United States is to lay taxes *for the purpose* of providing for the general welfare. For the laying of taxes is the *power*, and the general welfare the *purpose*, for which the power is to be exercised. Congress are not to lay taxes *ad libitum*, for any purpose they please; but only to pay the debts, or provide for the welfare of the nation." Jefferson's opinion on the Bank of the United States, 15th Feb. 1781, 4 Jefferson Correspondence, 524, 525. Such, also, were the views expressed by Mr. Hamilton, in his argument on the constitutionality of a national bank, in his treasury report on manufactures; by Mr. Ellsworth, 3 Am. Museum, 338; by President Monroe, in his message, May 4, 1822; by Mr. Adams, in his letter to Speaker Stevenson, July 11, 1832. In the case of *Gibbons v. Ogden*, 9 Wheat. 199, Chief Justice MARSHALL said: "Congress is authorized to lay and collect taxes, etc., to pay the debts and provide for the common defense and general welfare of the United States.

This does not interfere with the power of the states to tax for the support of their own governments; nor is the exercise of that power by the states an exercise of any portion of the power that is granted to the United States. In imposing taxes for state purposes, they are not doing what congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the states. When, then, each government exercises the power of taxation, neither is exercising the power of the other." Mr. Justice STORY concludes, that, "Under such circumstances, it is not, perhaps, too much to contend that it is the truest, the safest, and most authoritative construction of the constitution." Sec. 927. See, also, 1 Kent Com. 251; Serg. Const. Law, chap. 28, pp. 311, 315; Rawle Const. chap. 9, p. 104.

These limitations on the power of congress are, that the taxes must be levied "to pay the debts and provide for the common defense and general welfare of the United States." Const. art. 1, § 8.

But the United States are required by the constitution to guarantee to every state in this Union a republican form of government. Const. art. 4, § 4.

This requirement would be a mockery, if congress, under the right to tax for the general welfare, could prevent the exercise of the functions of state government. It would be to guarantee but a mere form of republican government, without the power in the government to execute its functions. But it is plain, from the promptitude evinced by congress in the repeal of the tax upon the process of the state courts, and from the exceptions in the internal revenue act, restricting the stamp duty so as not to include official documents issued by the state itself, that there was no intent to pass the constitutional limit, and that this tax upon official bonds given to the state by its officers is an error in drafting the law, which will doubtless receive as prompt correction.

Our duty, however, seems plain. In our opinion, the tax upon official bonds is not within the power of congress to impose, under the provisions of the constitution.

The demurrer should have been sustained to the paragraph.

Judgment reversed, and cause remanded.

NOTE.—This decision is substantially affirmed by the recent decision of the supreme court of the United States in the case of *Day v. Buffington*, 8 Alb. Law Jour. 317, wherein it was held that congress has no power to impose a tax on the salary of a judicial officer of a state, payable out of the state treasury.—REP.

McMillan v. The Bull's Head Bank.

McMILLAN, appellant, v. THE BULL'S HEAD BANK.

(22 Ind. 11.)

Surety — Notice of principal's default.

A, B. and C. executed to the plaintiff, a bank, a joint and several bond, in the penalty of \$15,000, with a condition reciting that A. had become a member of a certain firm, rendering it probably necessary for him to use more funds in the business than he had at command, and which he proposed to borrow, and then proceeding thus: "Now the foregoing bond is to be in force, and binding upon us, according to its terms, for the full amount of any loans and advances the said bank may make to said A., in connection with his said business, not to exceed in amount \$15,000, for which sum, by the foregoing bond, we acknowledge ourselves his sureties, and in case of his failure to pay any such loans or advances as aforesaid, that the same shall and may be collected off us. Unless such loans and advances are made to said A. in his business aforesaid, upon the faith of this bond, the same is null and void," etc. The plaintiff alleged that, on the faith of this bond, and for the purposes therein specified, it loaned A. a sum of money on the checks of two other parties, indorsed by A., and that these checks were protested for non-payment. *Held*, that the bond was not an overture to guaranty by the sureties, but an actual undertaking.

Held, also, that B. and C. were sureties, and not guarantors, and, therefore, not entitled to notice of loans made on the credit of the bond, and of the default of the principal debtor.

The surety is bound with his principal as original guarantor, and his obligation to pay is equally absolute, irrespective of any notice of the principal's default, while a guarantor is an individual contractor, to answer only for the consequences of the default of the principal, and is therefore entitled to notice of such defaults.

THIS was a suit by the Bull's Head bank against James T. and Samuel E. McMillan and James Goddard, upon a joint and several bond executed by them, in a penalty of \$15,000, with a condition reciting that James T. McMillan had become a member of a certain firm in New York, rendering it probably necessary for him to use more funds in the business of the firm than he would have at command, and which he proposed to borrow; and then proceeding thus: "Now the foregoing bond is to be in force and binding upon us, according to its terms, for the full amount of any loans and advances the said bank may make to said James T. McMillan in connection with his said business, not to exceed in amount \$15,000, for which sums, by the foregoing bond, we acknowledge ourselves

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his sureties, and, in case of his failure to pay any such loans or advances as aforesaid, that the same shall and may be collected off of us * *. Unless such loans and advances are made to said McMillan in his business aforesaid, upon the faith of this bond, the same is null and void. In witness," etc. It was averred by the complaint, that the plaintiff, on the faith of the bond, for the accommodation of James T. McMillan in the business aforesaid, loaned to him certain sums, viz., \$840 on the check of one Miller on another bank, indorsed by McMillan, and \$775 on a similar check of one Meyer, indorsed, etc.; that said checks were duly presented for payment, which was refused, and thereupon protested, etc.; and that both checks remain unpaid, etc. Copies of the bond and checks were made exhibits. There was also a paragraph for money loaned and money paid. It was assigned for error that the court below erred in overruling a demurrer by the sureties to the first paragraph of the complaint.

M. M. Ray, B. F. Claypool and B. L. Smith, for appellant.

L. & W. O. Sexton, for appellee.

FRAZER, C. J. The argument is, that the bond shows a mere overture to guaranty by the sureties, which at most would only create a secondary and collateral liability; and that there should have been an averment of notice of the loans made on the credit of the bond, and of the default of the principal debtor.

It was not an overture or proposition to guaranty, but an actual undertaking. The distinction will be readily seen by an examination of the cases of *Stafford v. Low*, 16 Johns. 67, and *Beekman v. Hale*, 17 id. 134.

There is considerable loose writing in the text-books upon the subjects of guaranty and suretyship. Sometimes the two things are confounded throughout, and the terms used interchangeably, as signifying the same thing. This has introduced some confusion in the cases, so that there are *dicta*, and even decisions, to the effect that, to fix the liability of a guarantor, notice of default of the principal debtor is required, such as in the case of an indorser of strictly commercial paper. *Smith v. Bainbridge*, 6 Blackf. 12, is a case of this character. It was decided on the authority of *Douglass v. Reynolds*, 7 Pet. 113, and was followed in *Virden v. Ellsworth*, 15 Ind.

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144. *Harris v. Pierce*, 6 id. 162, is not quite in harmony with those rulings, however. This doctrine has never been applied, that we are aware of, only in cases of letters of credit and the guaranty of commercial paper, except in *Virden v. Ellsworth*; and its soundness has been utterly denied, even in that class of cases, in New York and Massachusetts. *Oxford Bank v. Haynes*, 8 Pick. 423; *Douglass v. Howland*, 24 Wend. 35; *Smith v. Dann*, 6 Hill, 543. It is certain that the supreme court of the United States found it impossible to stand upon the broad principle which they had laid down in *Douglass v. Reynolds*, *supra*; for, when the same case came before that court again, a very important modification of the former ruling as to notice of default was made. *Reynolds v. Douglass*, 12 Pet. 497. See also 2 Am. L. Cas. 124. It is possible that the subject should receive a more thorough consideration than it has heretofore received in this court before the questions alluded to can be deemed closed against further discussion in this state. The view which we take of the bond sued on in the case before us renders it unnecessary to enter upon that investigation at present, and what has been said concerning the matter is not intended to commit the court upon it.

We are not of the opinion that the instrument sued on is a guaranty, in any strictly legal sense. A guaranty differs in some important respects from suretyship, and it is not easy to define it by any brief and comprehensive formula. Mr. Parsons says: "We cannot, therefore, define a guarantor of a bill or note any better than by saying that he is one who engages that the note shall be paid, but is not an indorser nor a surety." 2 Par. Notes and Bills, 117. And yet the same author, in his excellent work on contracts (chap. VII), uses the terms "guaranty" and "suretyship" as being of the same import. So also does Mr. Chitty, in his work on contracts. Chit. Con. 546. The contract of a surety corresponds with that of a guarantor in many respects, but important differences exist. The surety is bound with his principal as an original promisor; he is a debtor from the beginning, and must see that the debt is paid, and is held ordinarily to know every default of his principal, and cannot protect himself by the mere indulgence of the creditor, nor by want of notice of the default of the principal, however such indulgence or want of notice may, in fact, injure him. Being bound with the principal, his obligation to pay is equally absolute. On the other hand, the contract of a guarantor is his own separate contract; it is in the nature of a warranty by him that the thing guaranteed to be

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done by the principal shall be done, not merely an engagement, jointly with the principal, to do the thing. A guarantor, not being a joint contractor with his principal, is not bound to do what the principal has contracted to do, like a surety, but only to answer for the consequences of the default of the principal. The original contract of the principal is not his contract, and he is not bound to take notice of its non-performance, and therefore the creditor should give him notice; and it is universally held, that if the guarantor can prove that he has suffered damage by the failure to give such notice, he will be discharged to the extent of the damage thus sustained. It is not so with a surety.

In the present case the contract is joint and several, and the principal debtor is a party to it. The others are described in it as sureties, and expressly contract to answer as sureties. All may, of course, be sued together. But a guarantor cannot be sued with his principal, for his engagement is not jointly with the latter, but is strictly an individual contract. There is no case in the books, to our knowledge, and some pains has been bestowed in their examination, in which one contracting jointly with the principal debtor has been deemed a guarantor, and allowed to avail himself of such defenses as are peculiar to that character. The bond does not purport to be a contract collateral to some other engagement of the principal debtor. Its terms did not require that the contemplated loans should be made upon any other or additional security. It authorized loans to be made upon any terms that might be agreed to by the principal and the bank; and the obligation of the sureties was to pay them at maturity if the principal did not. It differed in no essential respect from any ordinary bond of a principal and sureties, conditioned to answer for a default of the principal. In such cases, surely, neither notice of acceptance nor notice of default is necessary to fix the liability of the sureties. We are of opinion that the complaint was good, and the demurrer to it properly overruled.

Upon trial of the issue made by an answer of general denial, the evidence showed that the loans were not made solely upon the credit of the bond. We do not think that this affected the question of liability.

Judgment affirmed.

Board of Commissioners of Montgomery County v. Elston.

BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY v. ELSTON.

(32 Ind. 37.)

Taxation of national currency.

The circulating notes of national banks, known as "national currency," are not exempt from taxation by a state.

THIS was a complaint by the appellee against the board of commissioners and treasurer of Montgomery county, to restrain a sale of certain personal property, levied upon by the said treasurer by virtue of a warrant to collect the sum of \$418.49, being the amount of tax and penalty on \$27,175 in the hands of the appellee on the first day of January, 1868.

One-half of this sum was in treasury notes of the United States, known as "greenbacks;" the remaining portion was in the notes of the national banks, designated as "national currency." This sum had been returned for taxation under protest.

A demurrer was overruled to this complaint, and a perpetual injunction was granted.

R. H. Galloway and P. S. Kennedy, for appellants.

S. C. & L. B. Willson and J. M. Butler, for appellee.

RAY, J. (after stating facts and deciding, in accordance with *Bank v. Supervisors*, 7 Wall. 26, that the United States treasury notes were not liable to taxation, continued):

There remain but two questions. Has congress attempted to extend this exemption from state taxation to the currency issued by the national banks? If she has declared this exemption, was the subject within her jurisdiction?

The act of February, 1862, declares, that "all stocks bonds, and other securities of the United States held by individuals, corporations or associations, within the United States, shall be exempt from taxation by or under state authority." 12 Stat. at Large, 346, § 2.

And this provision is reenacted, in application to the second issue of United States notes, by the act of July 11, 1863. 12 Stat. at Large, 546.

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And, as if to remove every possible doubt from the intention of congress, so far as treasury notes were involved (the national bank notes not then being issued), the act of March 3, 1863 (12 Stat. at Large, 709), which provides for a further issue of treasury notes, omits in its exemption clause the word "stocks," and substitutes for "other securities" the words "treasury notes or United States notes issued under the provisions of this act." The act authorizing the issue of national bank notes was approved June 3, 1864, and the 22d section provides that the notes shall express upon their face the promise of the association receiving the same to pay on demand, and that they are secured by the deposit of United States bonds with the treasurer of the United States. But these bonds are not the property of the United States, but of the national bank issuing the notes. It is true, that the government in the act agrees to redeem the notes on failure of the bank, but the primary liability rests upon, and promise to pay comes from, the national bank; and before the government does so redeem, she declares forfeit to herself all bonds deposited as security for the issue, these bonds being in excess of the aggregate of notes, and the bonds her own promise. Thus, in fact, in payment of the notes, by her, she simply pays her own bonds at less than their face, and may cancel an amount of said bonds at their current rate, not to exceed par, equal to the currency redeemed, and shall hold a first and permanent lien for any deficiency in the proceeds of the bonds, if sold, on the assets of the bank. There is no clause in this act exempting the notes from state taxation, but an express provision making its shares liable.

It is insisted, however, that the act approved June 30, 1864, entitled "An act to provide ways and means for the support of the government, and for other purposes" (13 Stat. at Large, 218), exempts this issue of the "national currency," as it is entitled. The first section of that act declares that "all bonds, treasury notes and other obligations of the United States shall be exempt from taxation by or under state or municipal authority."

The last section is as follows:

"§ 13. *And be it further enacted*, that the words 'obligation or other security of the United States,' used in this act, shall be held to include and mean all bonds, coupons, national currency, United States notes, treasury notes, fractional notes, checks for money of authorized officers of the United States, certificates of indebtedness, certificates of deposit, stamps, and other representatives of value of

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whatever denomination, which have been or may be issued under any act of congress."

This, at a first glance, might seem to bring "national currency" within the exemption, and, as we are not indebted to counsel for a solution of the difficulty, doubtless has misled them in the argument. But the words in quotation in the thirteenth section are technical, and are not the identical words used in the same order in the first section, and therefore the reference to that section would be more than questionable. All doubt, however, is removed by the use of the same technical phrase, in the eleventh section of the same act, in which it is provided, "that if any person having control, custody, or possession of any plate or plates from which any *obligation or other security*, or any part thereof, shall have been printed," etc., "or shall have or retain in his custody or possession, after a distinctive paper shall have been adopted by the secretary of the treasury for *obligations and other securities of the United States*, any similar paper adapted to the making of any such obligations or other security," etc., "every person so offending shall be deemed guilty of a felony, and shall, on conviction thereof, be punished," etc.

It thus appears plain that the entire intent and purpose of the last section of the act was to throw around "national currency" the same guards against counterfeiting that were by law provided for "obligations and other securities of the United States."

Clearly, no exemption in any act prior to the authority given to issue "national currency" can apply, and as they are not obligations of the United States, in any proper sense of that expression, as they do not rest primarily on the promise of the government to pay them as her own debt, but simply on her promise that she will amply indemnify herself in her own bonds, and only after failure of the bank and forfeiture of the bonds to her will she regard herself as finally liable; certainly, there is nothing in the letter of the law exempting this circulation from taxation; and though we do not discuss the power of congress to make such exemption, we are free to admit that we see nothing in the paper itself or the circumstances of its issue which would authorize such a limit to be placed on the power of the state to tax.

It follows, that the amount of the assessment on the moiety consisting of treasury notes was unauthorized and illegal; and that the amount rated upon that portion consisting of currency of the national banks was legal and proper.

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Under a rule often expressed in this court, the appellee, not having tendered to the treasurer of the county the amount legally due, cannot successfully invoke the aid of the court by the interposition of its extraordinary remedy of injunction to prevent the collection of a tax in part legal and in part illegally assessed.

Judgment reversed, and cause remanded, with direction to sustain a demurrer to the complaint for injunction. Costs here.

MEANS, appellant, v. SWORMSTEDT.

(88 Ind. 87.)

Promissory note — Personal liability of agent on.

The secretary of an incorporated company gave a promissory note, using the words "We promise to pay," etc., and signed it with his own name, with "Sec'y" affixed, and impressed thereon the seal of the corporation. *Held*, that he was not personally liable thereon.

THIS action was brought on a promissory note, of which the following is a copy :

\$488.00.

Madison, Ind., March 18, 1868.

Ninety days after date, we promise to pay to the order of Means, Kyle & Co. four hundred and eighty-three dollars, without any relief from valuation or appraisement laws. Value received. Payable at the Nat'l Branch Bank, Madison, Ind.

(Signed)

WM. B. SWORMSTEDT, Sec'y.

On the note was an impression of a seal bearing the words "Neal Manufacturing Co., Madison, Ind.," of which company Swormstedt was secretary. The revenue stamp was canceled by his initials.

The defendant demurred to the complaint for want of sufficiency of facts stated, and the demurrer was sustained. From this ruling the plaintiff appealed.

C. E. Walker and *W. S. Roberts*, for appellant.

H. W. Harrington and *C. A. Korbly*, for appellee.

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RAY, J. In *Hovey v. Magill*, 2 Conn. 680, where the defendant, being the agent of a corporation, gave a note, "I promise," etc., and signed it "A. B., agent of ——— company," SWIFT, C. J., said: "When an agent, duly authorized, subscribes an engagement in such manner as to manifest an intent not to bind himself, but to bind the principal, and when, by his subscription, he has actually bound the principal, then it is clear that the contract cannot be binding on him personally. It will be agreed that no precise form of words is required to be used in the signature; that every word must have an effect, if possible, and that the intention must be collected from the whole instrument taken together. Who can entertain a doubt, upon reading the note in question, that it was the intent of the defendant to bind the company, and not himself?"

And is not the intent equally clear in this case? We know that to hold the letters "sec'y," as intended to be "a description of the person," would be simply a legal fiction, false in fact. It would simply amount to rejecting the words as surplusage. But this cannot be done if effect can be given to them upon the face of the paper itself. Most certainly it should never be done against the plain intent of the party who adds the letters to his name for an evident purpose, where that purpose can be collected from the entire instrument, and does not render the paper itself a nullity.

The seal of the company is in the hands of the secretary; it is his duty to affix it to papers executed by the corporation. The presumption is, then, that he did, after signing his name and adding his office, affix the seal of the corporation, which, containing upon its face the proper designation of the corporation, was a signing of their name.

In the case already cited, the opinion proceeds: "I can see no good reason for the addition of 'agent,' but to render the note obligatory on the company, and exclude all idea of individual liability. This is the plain language of the transaction; and we ought to give it the obvious meaning, and not entrap men by the mere form of words. This mode of signing the note will fairly admit of this construction: I, as agent of the company, pledge their credit, or give their promise to pay the note; or, the company, by me as their agent, promise to pay it. But if we consider the word 'agent' as merely *descriptio personæ*, we give it no operation, and really expunge it from the writing. We are bound, however, to give effect to every word, if possible; and the only way to give

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this word any effect is to make the note binding on the company." It can be a matter of no import how a name is affixed to a paper, whether written with ink or pencil, printed or stamped. The intent in placing it there must control, and where that intent is evident, effect should be given to it. The fact that when such a presumed intent will destroy the character of the paper a court will not indulge the presumption, results only because there exists a stronger presumption in law, that every one intends his act shall have effect. *M'Clure v. Bennett*, 1 Blackf. 189, followed by *Mears v. Graham*, 8 id. 144, and *Potts v. Henderson*, 2 Ind. 327.

The rule, as stated in *Hovey v. Magill*, *supra*, is recognized in 1 Par. Con. 97, who states that, in such a case, "it is quite well settled that the company, not the agent, will be liable on the note." So, also, it is stated in *Angell & Ames on Corp.* § 294.

Judge STORY thus states the rule: "A liberal construction is ordinarily adopted in the exposition of commercial instruments, for the purpose of encouraging trade, and to meet, as far as possible, the ordinary exigencies of business, which require promptitude of execution, and rarely admit of deliberate examination of the true force of words. In furtherance of this policy, if it can, upon the whole instrument, be collected that the true object and intent of it are to bind the principal, and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." *Story Prom. Notes*, § 69. The well-considered cases sustain this position.

The note was plainly intended to read as executed by "Wm. B. Swarmstedt, Sec'y Neal Manufacturing Co., Madison, Ind.;" and if effect be given to the addition to the name, the corporation must be bound.

The ruling sustaining a demurrer was correct, and the judgment is affirmed with costs.

NOTE.—The general rule is well established that a person who has in fact signed a written document cannot discharge himself from personal liability on the ground that he only signed as agent for another, unless it appear upon the face of the instrument that he signed as such; and this is peculiarly so with regard to negotiable instruments. But it is often a nice question to determine whether the agent is or is not personally bound. The authorities are not harmonious, and we shall attempt to refer to only the most important. In *Price v. Taylor*, 5 H. & N. 540, merely appending to the signature a word of description, such as "director," "secretary," etc., was thought not to be sufficient. It seems, however, that the word "as" prefixed to the description would probably indicate the agency. In *Aggs v. Nicholson*, 1 H. & N. 165, a promissory note ran in form: "We, two of the directors of the A. L. A. S., by and on behalf of the said society, do hereby promise to pay," etc. (Signed) Charles Nicholson, H. Wood. The court held the directors not to be personally liable, though MARTIN, B., hesitated to

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accede to the judgment. In *Alexander v. Sizer*, L. R., 4 Ex. 102, the note ran: "I promise to pay," etc., and was signed for M. T. & W. company, J. S., secretary. The court held the defendant not personally liable, although *CLEASBY*, B., dissented. In *Dutton v. Marsh*, Q. B., 19 W. R. 754, the note ran: "We, the directors of, etc., do promise to pay," etc. (Signed) P. J. Marsh, chairman, J. Higgins, S. Broadbent, H. Johnson. The note contained no word indicating agency, except the word denoting an office in the body, but the corporate seal was affixed. The court held the directors personally liable. In the case of *Landus v. Melrose*, 2 H. & N. 298, the note read: "Three months after date we jointly promise to pay S., or order, 600*l.*, for value received in stock on account of the London and Birmingham Iron Hardware Company (limited)—payable at the London Joint Stock Bank," etc. (Signed) James Melrose, H. W. Wood, John Haines, directors. (Countersigned) Edwin Guest, secretary. The exchequer chamber held, that the signers were not personally liable, but inserted a denial that "we intend to throw any doubt upon the rule that an agent putting his name to a mercantile instrument is liable as a principal, unless the instrument distinctly shows that he signs as agent, or that we mean to break in upon the rule *verba fortius accipiuntur contra proferentem*." In this country it has been held, that, where an agent made a promissory note thus: "I promise to pay," and signed it *Pro. C. D.*, A. B., it was the note of the principal, and not of the agent. *Long v. Coburn*, 11 Mass. 97. So where A. and B. wrote a note in these words: "We jointly and severally promise," and signed it A. and B. for C., it was held to be the note of C. *Rice v. Gore*, 22 Pick. 158; *Emerson v. Proc. Hat Manufac. Co.*, 12 Mass. 237. So a note of like tenor, signed "A. B., agent for C. D.," was held to be the note of the principal. *Ballou v. Talbot*, 16 Mass. 461.

Where a promissory note was in these words: "I, the subscriber, treasurer of the Dorchester Turnpike corporation, for value received, promise," etc., and was signed "A. B., treasurer of the Dorchester Turnpike corporation," it was held to be the note of the corporation and not of the treasurer. *Mann v. Chandler*, 9 Mass. 385. So, where a note purported to be a promise by "The president and directors of a corporation," and was signed "A. B.—president," it was held to be the note of the corporation. *Mott v. Hicks*, 1 Cow. 513. The decision in *Hill v. Bannister*, 8 Cow. 81, is not in harmony with these decisions, nor has it been followed in this state. There the defendants gave their note with the addition of "Trustees of Union Religious Society. Phelps," and proved that it was given for a debt due from the society. The court, nevertheless, held the defendants to be personally liable.

As a general proposition it is undoubtedly true, that one who signs a writing as "agent," "trustee" or "president," is regarded as merely describing himself, and hence is held to be personally liable. *Taft v. Brewster*, 9 Johns. 334; *Stone v. Wood*, 7 Cow. 453. But when a writing is thus executed, with full authority from a principal, the party on whose account it is executed is alone liable. *Bank of Genesee v. Patchin Bank*, 19 N. Y. 315. In this case the several New York decisions are examined and the above principle announced. There, S. B. S., cashier of a bank, sent plaintiff, to be discounted, a bill of exchange, dated ten days previous, payable to the order of S. B. S., Cash., indorsed by him, with the same addition to his signature, and inclosed in a letter, dated at the banking-house, and signed "S. B. S., Cash." It was held that these circumstances imported that the indorsement was that of the bank, and not that of S. B. S. individually. So it has been held that an indorsement of a note to the cashier of a moneyed corporation, by adding the word "cashier" to his name in the indorsement, is a transfer to the corporation when that was the design of the transaction. *Watervliet Bank v. White*, 1 Denio, 608. And so an officer of a corporation to whose order, as such, a note executed to it is payable, and who indorses the note, adding to his name his official character, and negotiates it on behalf of the corporation, is not personally responsible as indorser. *Babcock v. Beman*, 11 N. Y. 200; see, also, *Bank of N. Y. v. Bank of Ohio*, 20 id. 619.

The true rule of construction is said by Mr. Justice STORY to be, "that if it can, upon the whole instrument be collected, that the true object and intent of the instrument are to bind the principal and not to bind the agent," courts of justice will adopt that construction of it, however informally it may be expressed. — REP.

SPITLER, adm'r, appellant, v. JAMES.

(28 Ind. 202.)

Promissory note — Indorsement of blank form — alteration by maker.

A. indorsed a blank form of a promissory note and delivered it to the maker, stipulating that it should not be made payable at a bank. In filling up the note the maker made it payable at a bank, and in that condition negotiated it. *Held*, that A. was liable on the note in the possession of a *bona fide*.

THE appellees brought this action against the appellant, as administrator of the estate of George W. Spitler, deceased, upon a note payable at the Laporte branch of the Bank of the State of Indiana, executed by Irwin & Hopkins to the said George W. Spitler, during his life, who indorsed it to J. & D. S. Eason, by whom it was transferred, by indorsement, to the appellees.

The complaint is in two paragraphs. The first alleges the insolvency of Irwin & Hopkins and of J. & D. S. Eason when the note became due, as an excuse for the failure to sue them.

The second paragraph alleges the transfer of the note, by indorsement, to the appellees, for a valuable consideration, before due, in the ordinary course of business, and its protest for non-payment.

The appellant answered in denial, and also in three special paragraphs. A demurrer was sustained to the second paragraph, and this presents the only question argued by the appellant arising upon the pleadings. This paragraph averred, that when the said George W. Spitler indorsed the paper in suit, it was simply a printed blank form, as follows: "— after date — promise to pay to the order of — $\frac{100}{100}$ dollars for value received, without any relief whatever from valuation or appraisement laws;" that the decedent, at the request of the makers, and for their accommodation, placed his name on the back of said paper; that he was informed that the paper was to be passed to John Eason, in part payment for a stock of goods, and that he stipulated that the note, when filled, should not be made payable at a bank; "that afterward said note was filled up as it now appears, and delivered to said John Eason, the words 'at the Bank of the State of Indiana, at the Laporte branch,' being inserted at the special request of said John Eason, though at the time of said insertion, and at the time of the delivery of said note, said John Eason was informed of the stipulation aforesaid, made by said dece-

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dent, but notwithstanding such information insisted upon and procured said words, 'at the Bank of the State of Indiana, at the Laporte branch,' to be inserted in said note, which was done without the knowledge or consent of said decedent."

The note, as set out in the complaint, was in this form :

" \$1,789.08.

LAPORTE, July 20, 1869.

Twenty-four months after date we promise to pay to the order of George W. Spitler, at the Bank of the State of Indiana, at the Laporte branch, seventeen hundred and thirty-nine dollars and eight cents, for value received, without any relief whatever from valuation, appraisement, or stay laws, with interest.

IRWIN & HOPKINS."

Indorsed: " Pay to the order of John Eason & D. S. Eason, who compose firm of J. & D. Eason.

GEORGE W. SPITLER."

" Pay to the order of James Kent, Santee & Co

JOHN EASON,
D. S. EASON,

Late firm of J. & D. S. Eason, in liquidation."

J. E. & E. M. McDonald, A. L. Roache and J. W. Nichol, for appellant.

W. C. Hannah, R. S. Duiggins, S. P. Thompson, L. A. Cole and E. L. Bennett, for appellees.

RAY, J. (after stating facts): It will be observed that, in this case, we are not called upon to consider the effect of the alteration of a written instrument against the consent of a party to its execution — there was neither erasion nor interlineation — but the fact that the maker, whom the indorser intrusted with the right to fill certain blanks in the paper, fixing the amount, the date, the time of payment, and the payee, in disregard of his trust "inserted," or included, after the name of the payee, in the blank space, a place where payable. What are the consequences of this breach of trust upon the paper in the hands of an innocent holder? In England the indorser would, perhaps, be discharged, because the courts there now hold the maker not chargeable with a simple breach of trust, but guilty of forgery. *Awde v. Dixon*, 6 Exch. 869; *Rex v. Hart*, 1 Moo. C. C. 486; *Regina v. Wilson*, 1 Den. C. C. 284. But this is recent law in England, and has never been generally accepted as authority in this country. *Bank of Mo. v. Phillips*, 17 Mo. 29. *Russell v. Langstaffe*, 2 Doug. 514, was a case where one Galley, having had frequent transactions with the plaintiff, a banker, and

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having overdrawn his account, was refused any further advance without an indorser acceptable to the plaintiff. Upon this, Galley applied to the defendant, and he indorsed his name on five copper-plate checks, made in the form of promissory notes, but in blank, no sum, date or time of payment being mentioned in the body of the note. Galley afterward filled up the blanks for different sums and dates as he chose. The plaintiff knew that the notes were blank at the time of their indorsement. In a suit upon these five notes, Lord MANSFIELD said: "The indorsement on a blank note is a letter of credit for an indefinite sum. The defendant said, 'trust Galley for any amount, and I will be his security.' It does not lie in his mouth to say the indorsements were not regular."

The case of *Aude v. Dixon*, *supra*, was where the defendant agreed to join his brother in making a promissory note for his accommodation, provided R. would also join. The defendant accordingly signed an instrument in the form of a promissory note, a blank being left for the name of the payee. R. refused to join, and afterward the defendant's brother delivered the imperfect instrument to the plaintiff for value, representing that he had authority to deal with it, and the plaintiff's name was inserted as payee. The court admit "the position, that a person who puts his name to a blank paper impliedly authorizes the filling of it up to the amount that the stamp will cover," but insist that the plaintiff could not recover, because the *prima facie* power to complete the instrument was coupled with a condition unknown to the plaintiff. In plain language, a party may clothe another with all the *indicia* of authority to complete an instrument to which he has attached his name in blank, and yet avoid liability, on the ground that he had imposed secret instructions upon the agent, limiting his apparent general power.

The peculiar practice of the English bar, which sustains suggestive interruptions from the bench, furnishes here an instance—a rare one, we trust—in which the law comes from the counsel, the sophism from the court.

The counsel assert, "where a person, intrusted with a negotiable instrument for a special purpose, delivers it to another, the mere contravention of the trust will not prevent the latter from recovering, if a *bona fide* holder for value, and without notice." PARKER, B., responds, "This is a false instrument." The fraternal faith that trusts a blank form, duly signed, to a brother's keeping, where such

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possession furnishes *prima facie* proof of a power to complete the instrument, may challenge our admiration for the confidence displayed, but that admiration would be chilled were we told that it involved no hazard, save to the stranger who trusted to the *prima facie* evidence of power this possession involved; that the brother whose confidence was betrayed, was held harmless by the law, and the stranger who reposes no confidence, but acts upon what the law admits is *prima facie* evidence, must alone suffer.

But this doctrine of forgery, as applied to a plain case of fraud, or breach of trust, was discussed by Chief Justice PARSONS, in *Putnam v. Sullivan*, 4 Mass. 45, where it was held, that when one indorsed a blank paper, with the intention that some thing should afterward be written to which the name should apply as an indorsement, the writing of the wrong thing was not a forgery, but a breach of trust, and he who had reposed the confidence must suffer alone when it was violated and the rights of an innocent party involved. In that case the defendant, a merchant, had intrusted his clerk with his blank indorsements, and one, by false pretenses, obtained them from the clerk and used them; and it was decided that the filling of the blanks was not a forgery, nor was it such a fraud as would discharge the indorser against the indorsee who had paid value for the paper; and the liability was placed upon the ground, that where one of two innocent parties must suffer, the loss should be sustained by him who has given the confidence, and thus enabled the fraud to be perpetrated.

In *Orrick v. Colston*, 7 Grat. 189, it was held, that a paper, signed in blank and indorsed in blank, may be filled up either as a common promissory note or a negotiable note, and the person who indorset it in blank will be liable on his indorsement to a holder for value.

In *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11, the rule was stated, that a *bona fide* holder of a bill of exchange had the power implied to fill all the blanks in the bill. So it was held in *Mechanics' and Farmers' Bank v. Schuyler*, 7 Cow. 337, that, in the hands of a *bona fide* indorsee, the indorser cannot question the transaction, though the blanks may have been filled in a manner entirely different from the understanding and expectation of the indorser when he put his name upon the note.

In *Fullerton v. Sturges*, 4 Ohio St. 529, where F. and others, sureties for C., signed an instrument payable to S. or order, in blank as to date, amount and time of payment, but with a private agreement

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that it should not be filled for more than \$1,000 or \$1,500, and delivered it to C., the principal, to procure the discount, and the instrument was presented by C. to S., the payee, and filled up for the sum of \$10,000, it was declared that one who intrusts his name in blank to another, to procure a discount, is liable to the full extent to which such other may see fit to bind him, where the paper is taken in good faith, without notice, actual or constructive, that the authority given has been exceeded; that such blank signature has the effect of a general letter of credit, and the rule is founded as well upon that principle of general jurisprudence which casts the loss, when one of two innocent persons must suffer, upon him who has put it in the power of another to do the injury, as, also, upon the rule of the law of agency which makes the principal liable for the acts of his agent, in violation of his private instructions, when he has held the agent out as possessing more enlarged authority. This case was approved in *Holland v. Hatch*, 12 Ohio St. 464. Parsons says of this *prima facie* evidence of authority to fill the blanks, that, as between the immediate parties and all others who have notice of any limitation in the authority, this presumption may be rebutted, but as to *bona fide* purchasers without notice, it is conclusive. 1 Bills and Notes, 109. To the same effect is Edwards on Bills, 92, *et seq.*

Upon the question of what constitutes a *bona fide* holder, the law seems now well settled.

In *Michigan Bank v. Eldred*, 9 Wall. 544, it is said that where "it clearly appeared that the plaintiffs were indorsers [indorsees] for value at the date of the note, in the usual course of business, without notice of any equities between the antecedent parties, such a party is regarded, in the commercial law, as a *bona fide* holder of the negotiable instrument, and the rule is irrepealably established by the decisions of this court, that the indorser [indorsee], under those circumstances, takes the title, unaffected by any equities between the antecedent parties to the instrument, and may recover thereon, although, as between the antecedent parties to the same, the transaction may be without any legal validity." The rights of the holder are to be determined by the simple test of honesty and good faith, and not by mere speculation as to his probable diligence or negligence. *Magee v. Badger*, 34 N. Y. 247; *Belmont Branch Bank v. Hoge*, 35 id. 65; *Lord v. Wilkinson*, 56 Barb. 593.

The principle controlling the case of *Holland v. Hatch*, 11 Ind.

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497, is not in conflict with the authorities we have cited. It is there stated that "all blanks may be filled which are necessary or proper to make the instrument a perfect and complete bill of exchange or promissory note, as the case may be." It is denied that the addition of the words "without relief from valuation or appraisement laws," was necessary or proper to complete the bill, and their addition is held to avoid the instrument. This case was questioned in *Holland v. Hatch*, 15 Ohio St. 464, so far as it held the bill void by reason of the additional stipulation.

In this case it was proper to complete the note and render it negotiable by the law merchant, to make it payable at a bank. There was sufficient space for that purpose, and whatever question there may have been while the note remained in the hands of a party having notice of the limitation on the authority of the maker, imposed by the indorser, no defense can be based upon such limitation when the paper has passed into the hands of a *bona fide* holder.

The principle which excludes defenses against instruments negotiable by the law merchant, in the hands of a purchaser before due, for value, and without notice of defects, would be violated by every exception introduced, and the value of such securities greatly lessened in the market.

The sole questions which should present themselves to one receiving such paper in the regular course of business are, whether the signatures are genuine and the paper unaltered. It is doubtless often convenient to indorse such instruments in blank and deliver the paper to the maker, but the act gives authority to the holder to fill the blanks in conformity to the general character of the paper, and involves confidence in the integrity of the person to whom this general authority is given. If, in violation of such trust, there be written within such blanks any stipulation, usual to paper of the class indicated by the blank form, a *bona fide* holder will be protected. It is not to be supposed that a court which has rigidly enforced the liability of a surety under circumstances involving the same principle in the case of an official bond, should hesitate in its application to a negotiable note.

We have held, that where the obligee accepts an instrument perfect in form and execution, which comes to him from the person who should have possession of the instrument for the purpose of such delivery, the obligee may accept it without further inquiry. The entire transaction, so far as the obligee is involved, is according

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to the ordinary and natural course. The surety, however, while he executes the instrument and places it in the usual channel for delivery, departs from the ordinary course of procedure by circumscribing the general authority by a condition unknown to the obligee. The condition is disregarded, a fraud is accomplished, and he who has not scrupled to trust his principal with the semblance of a general authority to make the delivery, must stand the hazard he has incurred. *The State ex rel., etc. v. Pepper*, 31 Ind. 76. See, also, *Deardorff v. Foresman*, 24 Ind. 481, where the rule was applied to a note negotiable under the statute.

It appears by the complaint and answer that the note was indorsed in a blank form, and, without alteration, erasure or interlineation, was filled up as a note negotiable by the law merchant, and in that condition was, before due, and in the ordinary course of business, for value, transferred to the plaintiff. The act of the decedent enabled the maker to put the paper in this condition into the market, and the consequences must rest upon his estate. The demurrer was properly sustained to the paragraph, as it constituted no defense to the second paragraph of the complaint.

The judgment is affirmed, with costs.

NOTE.—It has recently been decided, in the exchequer chamber, that if a deed be delivered and a blank left therein be afterward improperly filled up (at least if this be done without the grantor's negligence), it is not the deed of the grantor. *Swan v. The North British Australasian Company*, 2 Hurl. & C. 175. But this principle, when applied to negotiable instruments, has been limited in its application. These instruments are not only assignable, but they form part of the currency of the country. It has, therefore, been uniformly held that where a man writes his name across the back of a blank bill or note, and parts with it, and it is afterward improperly filled up, he is liable as indorser; if he write it across the face of the bill he is liable as acceptor; or if he sign his name to a blank note he is liable as maker, provided, in either case, the instrument has once passed into the hands of an innocent indorsee, for value, before maturity.

The English cases cited, as holding the improper filling up of a blank instrument to be forgery, were, most of them, criminal prosecutions. For the purpose of obviating the incongruity of allowing a recovery upon an instrument which was itself a forgery, the courts of this country, in civil actions, have placed the liability of the author of the blank signature on the ground of estoppel.

The question was much discussed in *Van Duzer v. Howe*, 21 N. Y. 531, where a blank acceptance had been filled with a sum exceeding that fixed by the acceptor, and the acceptor's liability was rested solely on the ground of estoppel. The principle that when one of two innocent parties must suffer, he should bear the loss whose act has caused the injury, has also been generally relied upon in the cases, and in some of them has ruled the decision. *Ingham v. Primrose*, 7 C. B. 82.

The paper at delivery may be entirely blank above the signature, or in the ordinary form of a printed bill or note, with the material parts in blank, and if it be filled up consistently with the purport or tenor of the form signed or indorsed, the signor or indorser will be liable. *Orrick v. Colston*, 7 Grat. 189; *Visher v. Webster*, 8 Cal. 112; *ves v. Bank*, 2 Allen, 236; *Mundy v. Threlkeld*, 13 Geo. 155; *Mitchell v. Culver*, 7 Conn.

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536; *Robertson v. Smith*, 18 Ala. 220; *Douglas v. Scott*, 8 Leigh, 43; *Fullerton v. Sturgis*, 4 Ohio St. 539; *Norwich Bank v. Hyde*, 13 Conn. 279; *Turrey v. Fisk*, 10 S. & M. 590; *Bank v. Curry*, 2 Dana, 148.

It is now well settled that, in order to impeach the title of a purchaser of current negotiable paper, it must be shown that he acted in bad faith, believing at the time of the purchase that there was some infirmity about the paper. *Goodman v. Harvey*, 4 Adol. & Ellis, 870; *Goodman v. Simonds*, 20 How. (U. S.) 343; *Steinhart v. Baker*, 34 Harb. 436; *Bentor v. Paquin*, 40 Vt. 199; *Bassett v. Avery*, 15 Ohio St. 209. But, if the paper be so filled up as to create a questionable appearance, or not according to the purport and tenor of such an instrument, it is sufficient to put the purchaser on his guard. *Crusby v. Grant*, 35 N. H. 273; *Mohatme Bank v. Douglas*, 31 Conn. 170. But if the defect does not appear on the face of the paper, it seems the purchaser may safely rely on the maker or indorser. *Merriman v. Rockwood*, 47 N. H. 81; *Bank v. Goss*, 31 Vt. 315; *Hastings v. Lombard*, 16 Maine, 140; *Smith v. Maberly*, 10 B. Monr. 286.

A person who has signed a blank instrument for accommodation may revoke it at any time before its inception or delivery to a third party (*Smith's Exors. v. Wyckoff*, 3 Sandf. Ch. 77); and the delegated power to fill up such a paper is revoked by the death of the signer, and if it be afterward filled and transferred, it seems the decedent's estate cannot be made liable, even when the instrument is in the hands of a bona fide purchaser without notice of the death. *Smith's Exors. v. Wyckoff*, 3 Sandf. Ch. 77; *Michigan Ins. Co. v. Leavenworth*, 30 Vt.—HEP.

THE GERMAN MUTUAL INSURANCE CO., appellants, v. GRIM *et al*

(32 Ind. 249.)

Voluntary conveyance—Estoppel as to grantor—Equities of voluntary grantee as against subsequent purchasers—Reforming deed.

A., owning certain lands, and intending to convey the same to his daughter as a gift, executed a deed, in which, through a mistake of the draughtsman, the premises were incorrectly described, and the name of the daughter's husband inserted instead of her own as grantee. No consideration was paid or promised for the conveyance, although a consideration was named in the deed. The deed was delivered to the daughter and duly recorded, and she was placed in possession. Afterward the husband executed a mortgage, containing the same erroneous description of the premises, to a bona fide mortgagee, who, upon foreclosure, purchased the premises, and took a sheriff's deed containing the same erroneous description. Suit was brought by purchaser to correct the description; whereupon, A., having then first discovered the error in his former deed, executed and delivered to his daughter another voluntary deed, wherein she was named as grantee, and the premises correctly described. *Held*, 1. That the purchaser having acted in good faith, and without any notice of defect in the husband's title, A. was estopped from denying that the deed to the husband was made in good faith, or that the grantee was properly named therein. 2. That the daughter being a voluntary grantee, had no claim either under the original deed nor under the one executed pending suit. 3. That the deed to the husband was not void for uncertainty in the description of the premises conveyed, and that the plaintiffs were entitled to have their deed reformed.

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SUIT to reform deed.

The complaint alleged that the appellees Ritter and his wife, in February, 1867, sold and conveyed to the other appellee, Grim, a lot of land described in the deed, by mistake of the draughtsman, as "the middle twenty-two feet four inches of lot number 27, on Upper Spring street, being twenty-two feet four inches in front and rear, and extending back the same width sixty feet, being part of lot held by said Ritter under a deed from John Yager and wife, recorded in book W, page 363." That the correct description of the property intended to be conveyed was "all that part of lot number 27 on Upper Spring street, which is bounded by a line beginning *seventy-two and one-third feet* from the north-east corner of said lot on Upper Fourth street, and running thence southwardly with the line of said Upper Fourth street twenty-two and a third feet; thence westwardly at right angles to said street sixty feet; thence northwardly along the west line of said lot twenty-two and one third feet; and thence eastwardly sixty feet to the place of beginning." That Grim mortgaged said premises to the plaintiff, by the same erroneous description, in 1861, to secure a note; that the mortgage was afterward foreclosed, and the premises purchased by the plaintiff at the foreclosure sale, the sheriff's deed containing the same erroneous description; and prayer was made for a reformation of these deeds and of the mortgage.

Grim answered by a general denial, and Mrs. Ritter died pending the suit. Ritter answered by a general denial, and a second paragraph, which was struck out on demurrer; he then filed a third paragraph in the nature of a cross-complaint; he admitted that he was the owner of the property described in the complaint, and alleged that Mrs. Grim was his daughter; that, for the purpose of providing for her, he intended to make the conveyance to her as a gift, and not to her husband; that no consideration was ever paid or promised for said premises by Grim, nor by any other person; that by a mistake of the draughtsman the deed was made to Grim instead of his wife, and that when he executed the deed he believed that it conveyed the property to Mrs. Grim; that he delivered the deed to her and put her in possession; that the mistake in the name of the grantee, and in the description, was not discovered by him until after suit brought, since which he had conveyed the premises to Mrs. Grim by a proper description; and that said Mrs. Grim had an interest in the suit adverse to the plaintiff. Prayer, that she be

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made party defendant, and that her title to the premises be perfected and confirmed.

Mrs. Grim was made party defendant and filed her answer, adopting the answer and cross-complaint of Ritter. The issue was tried by the court and judgment was rendered for the defendants, and Mrs. Grim's title was confirmed according to the prayer.

T. L. Smith, M. C. Kerr, J. A. Ghormley and A. Seidensticker, for appellant.

G. V. Hawk and R. M. Weir, for appellee.

ELLIOTT, J. We are compelled to examine the important questions presented by the record in this case without any argument in behalf of the appellees.

The material questions in the case arise upon the third paragraph of Ritter's answer and cross-complaint, which was also adopted by Mrs. Grim, and to which the circuit court overruled a demurrer. Was that ruling correct?

We will first examine the questions raised by the complaint and the answer with reference to the position and rights of Ritter in opposition to the appellant. The points presented by the answer are, that the deed from Ritter to Grim was voluntary, and made without any valuable consideration whatever; that it was intended to be made to Mrs. Grim as a gift, and, under the belief that she was named as the grantee, the deed was delivered to her, and she was put into the possession of the premises intended to be conveyed, but that, by the mistake of the draughtsman, the conveyance not only failed to contain a proper description of the premises, as alleged in the complaint, but the name of Louis Grim was inserted in it, erroneously, as the grantee, instead of his wife, Catharine Grim, as was intended by the grantor; and that Ritter, upon the discovery of said mistakes, after the commencement of this suit, executed to Mrs. Grim another deed, containing a proper description of the premises. These facts seem to have been regarded by the circuit court as sufficient to raise a superior equity in Mrs. Grim, and to constitute a valid defense to the action on the part of Ritter. The only averments in the answer which Ritter could possibly rely upon as a defense are, that the deed to Grim was made without any valuable consideration, and that, by mistake of the draughtsman, it was

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made to Louis instead of Catharine Grim. The appellant occupies the relation of an innocent purchaser, for a valuable consideration, from Louis Grim. The deed from Ritter to Grim purports upon its face to have been made for the valuable consideration of \$200, paid by Grim to Ritter, the receipt of which is acknowledged. It was placed on record on the day of its execution. The answer contains no averment of notice to the appellant, at any time, that the conveyance to Grim was voluntary, or of the alleged mistake in the name of the grantee. In the absence of such notice, the appellant was authorized to presume that the deed was made upon a valuable consideration, as expressed upon its face, and that the proper grantee was named therein; and the appellant having become a purchaser for a valuable consideration, in good faith, from the grantee named in the deed, Ritter must be held as estopped to deny that the deed was made for a valuable consideration, or that the grantee was properly named, and thereby defeat the appellant's title under it. *Guard v. Bradley*, 7 Ind. 600; *Trimble v. The State*, 4 Blackf. 435. And the fact that the appellant was compelled to appeal to the chancery powers of the court, to correct the mistake in the description of the land, does not avoid the estoppel. Such estoppels, when consistent with the principles of equity and good conscience, are recognized and enforced in courts of equity the same as at law. Here the appellant, relying upon the facts apparent on the face of the deed from Ritter to Grim, became the purchaser under the latter, in good faith, for a valuable consideration, and it would be a fraud on the appellant if Ritter were now permitted to deny the truth of the recitals in his deed, and thereby defeat the appellant's title, which equity will not sanction.

We will now examine the question as to the claims of Mrs. Grim, and see whether her position is a more advantageous one than that occupied by Ritter.

The claim of Mrs. Grim is, that the conveyance from Ritter, which in fact was made to her husband, was intended to be made to her as a voluntary gift from her father.

If, then, the deed had been made to Mrs. Grim, as she claims it was intended to be, she would have occupied the position of a voluntary grantee, without a valuable consideration; but if the conveyance did not describe the premises intended to be conveyed, it would still have been inoperative, and for that reason would not have been an executed gift; and as the conveyance was merely vol-

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untary, it did not invest her with any equity which she could have enforced, even as against Ritter, and much less as against a purchaser for a valuable consideration, in good faith, from the grantee named in the deed. It is settled, at least in this state, that a voluntary executory contract for the conveyance of land will not be specifically enforced; nor will a voluntary deed be corrected of mistakes on the application of the grantee against the grantor, though it will be on the application of the grantor against the grantee, where, by mistake, the conveyance is for a larger estate than was intended. *Andrews v. Andrews*, 12 Ind. 348; *Froman v. Froman*, 13 id. 317; *Randall v. Ghent*, 19 id. 271.

In *Froman v. Froman*, *supra*, a father made a voluntary conveyance of a tract of land to one of his sons, but, by mistake, described the land as being the south-east quarter of a certain section, instead of the south-west quarter. Subsequently the father made a voluntary conveyance of the land, by a proper description, to his other children. On an application for partition among the latter, the son to whom the first conveyance was made set it up to defeat the subsequent conveyance, and asked that the mistake in the description of the land might be corrected. It was held, on appeal to this court, that equity would not aid in perfecting a title under a voluntary deed in such a case.

Cases are found in which a distinction is attempted to be drawn in such instances between a voluntary executory contract or conveyance to a stranger and one to a child, where it is deemed to be founded on a meritorious consideration. The case of *Ellis v. Nimmo*, LL. & G. *temp.* S. 333, is a leading one of this class, in which it was held, that a voluntary contract in writing, by a father to make a post-nuptial provision, or settlement upon his daughter, might be enforced against him in equity, as being founded on a meritorious, although not a valuable, consideration. Justice STORY, in commenting on that case, says: "But this doctrine has been since denied, and the general rule seems now established, that the court will not execute a voluntary contract, but will withhold assistance from a volunteer, whether he seeks to have the benefit of a contract, or a covenant, or a settlement." Story Eq. § 793 *d.* See, also, § 164. A distinction seems to be drawn between cases of this character and those of a defective execution of a power, in which it is said relief may be granted in favor of a voluntary donee.

From the decree rendered in the case, it may be inferred that the

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learned judge who tried the case in the circuit court regarded the deed executed by Ritter to Mrs. Grim, pending the suit, as relating back to the date of the conveyance to Louis Grim, and as investing Mrs. Grim with the legal title, as of that date. But it must be remembered that the appellant had, in the mean time, become the purchaser of the premises for a valuable consideration, under the conveyance to Louis Grim, without notice of Mrs. Grim's claim; and hence the subsequent voluntary conveyance to her by Ritter could not prejudice the rights of the appellant thus acquired. The doctrine of relation cannot be invoked to work a fraud, or prejudice the intervening rights of an innocent purchaser for value. *Fite v. Doe*, 1 Blackf. 127; *Jackson v. Bard*, 4 Johns. 230.

The deed from Ritter to Mrs. Grim of the 4th of May, 1864, must, therefore, stand upon its own merits, and, having been executed pending this suit, can have no effect on the prior equities of the appellant.

Where the equities of the parties are equal, that having priority in time will prevail. But here Mrs. Grim, as we have seen, had no claim under the conveyance to Louis Grim which a court of equity would enforce, even as against Ritter. But if it were otherwise, still as her claim is only that of a voluntary grantee, while the appellant claims as a *bona fide* purchaser for a valuable consideration, without notice of the claim of Mrs. Grim, the equities are not equal; that of the appellant is superior, and must prevail.

In any view of the case, it seems clear that the facts alleged in the third paragraph of the answer and cross complaint do not constitute a valid defense to the complaint, in favor of either Ritter or Mrs. Grim, and that the court erred, therefore, in overruling the demurrer.

It appears by the evidence in the case, that the appellant was in possession of the premises in controversy at the date of the conveyance by Ritter to Mrs. Grim of the 4th of May, 1864, under a claim of title adverse to both Ritter and Mrs. Grim. And it is well settled, that a deed executed under such circumstances is void for maintenance. *Fite v. Doe*, 1 Blackf. 127; *Leslie v. Slusher*, 15 Ind. 166; *Martin v. Pace*, 6 Blackf. 99; *Galbreath v. Doe*, 8 id. 366.

From the facts presented by the pleadings and evidence in the case, we are not prepared to say that the deed from Ritter to Louis Grim is void for uncertainty in the description of the premises conveyed, or intended to be conveyed, thereby, or that the property

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intended to be conveyed may not be located under it. The part of the description in the deed material to this question reads thus: "and being the middle twenty-two feet four inches of lot number 27, on Upper Spring street, being twenty-two feet four inches in front and rear, and extending back the same width sixty feet; *being part of the lot held by said Ritter under deed from John Yager and wife, recorded in Book W, page 363.*"

The latter part of the description, which we have italicised, seems to have been overlooked by the appellant's counsel, and the deed from Yager to Ritter referred to was not given in evidence. Nor do the pleadings state either the length or width of the lot, but it is alleged in the complaint that Ritter owned the south part thereof, extending from the south line northward seventy feet, fronting on Upper Fourth street on the east, and extending back sixty feet, and that Ritter intended by the deed to convey the middle portion thereof, being twenty-two feet and four inches in front and rear. These facts are admitted by the third paragraph of Ritter's answer. The form and dimensions of the lot would be ascertained by reference to the recorded plat; but the evidence shows that its width is sixty feet, fronting on Upper Spring street, and its length one hundred and twenty feet, fronting on the east on Upper Fourth street. Ritter testifies that he formerly owned a part of said lot 27, fronting on Upper Fourth street, and divided it into three parts of about twenty-two and one-third feet front each, one of which he sold, and conveyed another to his son-in-law Bowman, and intended the third one for his daughter Mrs. Grim.

The general rule in regard to the construction of the description of the premises in a deed is one of the utmost liberality. The intent of the parties, if it can by any possibility be gathered from the language employed, will be effectuated. *Peck v. Mallams*, 10 N. Y. 509; *Key v. Ostrander*, 29 Ind. 1.

It is also a rule of construction, that where one deed refers to another for description of the granted premises, reference may be had to the description in the latter to aid that of the former. 3 Washb. Real Prop. b. 2, p. 638; *Key v. Ostrander, supra*. Now, applying these rules to the present case, it seems but reasonable to construe the description in the deed from Ritter to Louis Grim as meaning twenty-two feet and four inches in front and rear, and extending back the same width sixty feet, of that part of lot 27, on Upper Spring street, held by said Ritter under deed from

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John Yager and wife, recorded in book W, page 363. And if, by reference to the recorded plat and the deed of Yager to Ritter referred to, the middle third of the premises described in the latter deed should correspond with the premises intended to be conveyed, as the evidence indicates, there would seem to be no difficulty in locating the premises. At any rate, should such difficulty be found to exist, it would result from the practical application of the middle third of the premises conveyed by Yager to Ritter to the premises intended to be conveyed by the deed to Louis Grim, and would not be apparent from the description itself; and the deed, therefore, could not be held void for uncertainty in the description.

The judgment is reversed, with costs, and the cause remanded, with directions to the circuit court to sustain the demurrer to the third paragraph of the answer and cross-complaint of Ritter, and to the second paragraph of the answer and cross-complaint of Catharine Grim, and for further proceedings not inconsistent with this opinion.

FRAZER, C. J., dissented.

ROBBINS, appellant, v. CHEEK.

(38 Ind. 322.)

Promissory note—Action for interest after payment of principal.

Where a promissory note contains a provision for interest, an action may be maintained for the interest after the principal has been paid.

J. S. Scobey, E. R. Monfort, C. Ewing and J. K. Ewing, for appellant.

W. Cumback, S. A. Bonner, J. Gavin and J. D. Miller, for appellee.

RAY, J. The appellee sued Robbins before a justice of the peace, by filing as a cause of action a note which reads as follows:

One day after date I promise to pay to the order of John Cheek the sum of eleven hundred dollars, without regard to valuation or appraisement laws of Indiana, for value received, with ten per cent interest, this 31st day of May 1865.
JACOB F. ROBBINS.

Indorsed: "Credit by cash eleven hundred dollars, October 15, 1865."

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The suit was instituted February 9, 1869, and on the day of trial the appellant appeared and answered in four paragraphs: first, the general denial; second, payment; third, that before the commencement of this suit he paid to the plaintiff the sum of eleven hundred dollars, the principal sum due him, in full of his principal, which was received as such, and that there is nothing unpaid upon said note but interest, and the plaintiff cannot maintain his said action for interest only; fourth, that the note in suit does not belong to said plaintiff, but is the property of Sandcreek township, in said county, which township is a body corporate and politic, and as such may sue and be sued; that Daniel Meredith is the trustee of such township; that the term of office of said plaintiff, who was trustee of said township when said note was given, has long since expired; that said note was given for funds and moneys of said township borrowed by the defendant of said Cheek as such trustee; that said Cheek has not accounted to such township for the sum due on said note; and that he should have delivered said note to his successor at the expiration of his term; wherefore, said plaintiff is not the real party in interest, and this action should abate; and the defendant on oath says that this fourth paragraph of his answer is true, etc.

On appeal to the common pleas court, a demurrer was overruled to the complaint and sustained to the third and fourth paragraphs of the answer; and to the sustaining of this demurrer and the exclusion of evidence offered on the trial to support the averments contained in the answer exceptions were taken, and error is assigned thereon in this court, a judgment having been rendered for the amount of interest due by the terms of the note.

In support of the errors assigned, the decision in the case of *Comparet v. Ewing*, 8 Blackf. 328, is cited, where it was declared, that "if a creditor receive the principal sum due him, he cannot afterward sue for the interest." This was so held in an action upon a note "with interest from date." The cases cited to sustain this ruling are, *Dixon v. Parker*, 1 Esp. 110, and *Tillotson v. Preston*, 3 Johns. 229.

In regard to the last case, it may be remarked, that there was no agreement to pay interest, and that the court of errors of the state of New York had, more than ten years before the case was cited as sustaining the ruling in *Comparet v. Ewing*, held, expressly, that the rule did not apply to a case where there was an express

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agreement in the note or obligation to pay interest. The chancellor used this language:

"The counsel for the plaintiff in error are wrong in supposing that the rule of law, that an action cannot be sustained for the interest of a demand after the principal has been paid, is applicable to this case. The cases of *Tillotson v. Preston*, 3 Johns. 229; *Johnson v. Brannan*, 6 id. 268; and *People v. County of New York*, 5 Cow. 331, were all cases in which there was no contract for the payment of interest, and it could only be recovered as damages for the non-payment of the principal debt when it became due. In such cases, if the party to whom the money is payable accepts the amount agreed to be paid, in full satisfaction of the principal debt, without requiring the debtor to pay interest from the time the debt became payable, he cannot afterward maintain an action for the mere incidental damages which he has sustained by reason of the debt not being paid upon the very day when it became due. But where there is an express agreement to pay the interest, as well as the principal, of the plaintiff's demand, I apprehend that the performance of one part of the agreement would be no bar to an action for the non-performance of another part thereof. It is a case of very frequent occurrence, that the interest is made payable before the principal becomes due; and no one ever doubted that, in such a case, an action could be maintained for the non-payment of the interest merely." *Fake v. Eddy*, 15 Wend. 76.

The case of *Tillotson v. Preston*, considered with the case of *Fake v. Eddy*, decided in 1835, was, therefore, in direct conflict with the decision of *Compart v. Ewing*.

The other case cited from 1 Esp. 110, held simply, "that the plaintiff could not, in the present form of action, recover the interest, having received the principal;" and this, on the ground that interest in such action could only be given by a jury in the form of damages, and not by virtue of an express contract. This construction was placed on this case in *The White Water Valley Canal Co. v. Hawkins*, 4 Ind. 474. But the distinction between the right to recover interest by reason of a stipulation in the contract, and the recovery which the jury gave by way of damages only, was plainly stated in *Watkins v. Morgan*, 6 C. & P. 661, decided in 1834, and might not unreasonably have suggested a doubt in regard to the propriety of citing the case of *Dixon v. Parkes* to sustain the ruling in *Compart v. Ewing*.

The statute in force when the note was given upon which the action in the latter case was brought, expressly authorized the

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recovery of interest where it was contracted for. Rev. Laws 1831, p. 200. So that the decision was, in effect, that where by law a certain sum is due by contract, it may be discharged by the payment of a less sum, a rule not elsewhere recognized as founded in reason or authority, at that date or since.

But whatever the state of the authorities at the time that decision was announced, there can be no question now of its unsoundness. Parson declares, that "interest, if expressly promised to be paid, is as much a part of the debt as the principal." 2 Notes and Bills, 375. "But if the principal has been paid, or a new note or bill given for it, and interest which was due was not paid, it remains due, and an action may be maintained for it." Id. 398.

The rule is stated to the same effect in Edwards on Bills and Promissory Notes, 719.

The demurrer was properly sustained to the third paragraph of the answer. The decision in the case of *Comparet v. Ewing* must be regarded as overruled.

The demurrer to the fourth paragraph was correctly sustained on the authority of *Robbins v. Dishon*, 19 Ind. 204.

The judgment is affirmed, with ten per cent, damages and costs.

BAGOTT and another, appellants, v. MULLEN.

(38 Ind. 332.)

Sureties — contribution between — Jurisdiction.

The parties were sureties on an official bond, upon which judgment had been recovered and paid by the plaintiff. In an action against the co-sureties for contribution, the latter alleged, in defense, that they had never been served with process, nor appeared in the action on the bond; that the plaintiff had appeared for them without authority, and suffered judgment to be entered, to defraud them; that he had, without their knowledge, entered into a special contract with the relators in that action to pay the judgment out of funds then in his hands, belonging to the principal on the bond, and, in consideration of such agreement, received an extension of one year's time on said judgment; that but for such extension of time the judgment could have been made out of the property of the principal. *Held*, that these facts did not constitute a defense to the action.

The defendants further alleged that they signed the bond out of which the liability arose at the request of the plaintiff. *Held*, that they were, nevertheless, liable to contribution.

CASE stated in the opinion.

H. W. Harrington and M. K. Rosbrough, for appellants.

RAY, J. Complaint against appellants, charging that, in 1864, the state, on relation of Hasselman and another, recovered a judgment against one Vandever, as sheriff, and the appellee and the appellants, upon an official bond, a copy of which judgment is filed with the complainant; that said Vandever is notoriously insolvent; and that appellee has been compelled to pay said judgment in full, and demands contribution from the appellants.

A sixth paragraph of answer was filed, which averred that process was not served personally on the appellants in the suit upon which the judgment was rendered, and that neither of the appellants appeared to the action; but that the appellee, without authority, appeared for them, and suffered judgment to be entered against them, to defraud them, and entered into a special contract with the relators to pay the said judgment with funds belonging to the said defendant Vandever, then in the hands of the said appellee, and, in consideration of said agreement, received an extension of time for one year on said judgment; that, but for such extension of time, the sum named in said judgment could have been made out of the property of said Vandever; and that said extension of time was given without the knowledge of said appellants. It is also alleged, that the appellants signed the official bond of Vandever, from which the liability arose, at the request of the appellee.

A demurrer was sustained to this paragraph.

It will be seen that the answer does not charge that the appellee had any funds in his hands belonging to the judgment defendant, Vandever, or that the appellants had any defense to the action, or that the agreement to extend the time within which said appellee was to pay the judgment himself out of such property prevented the appellants from having execution against the property of the principal defendant in the judgment; nor was the contract for an extension of time made a part of the judgment entry. It is recited in the judgment record, that the parties to the suit appeared and submitted the cause for trial to the court, and that it was agreed by the parties that the plaintiff should have judgment against the defendants.

The ruling in the case of *Wiley v. Pratt*, 23 Ind. 628, was, that where the judgment showed an appearance for the party, the juris-

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diction of the court can only be controverted by proof of fraud, or that the judgment defendant was not a resident of the state, nor during the pendency of the suit within the jurisdiction of the court, and had no notice of the action nor authorized the appearance, unless, without such notice or authorized appearance, a defense can be established on the merits to the cause of action. The general averment of fraud, without any statement of facts, constitutes no ground upon which to question the jurisdiction of the court.

There remains, then, the averment that the appellants signed the bond of Vandever, as sheriff, at the request of the appellee.

It is stated in Chitty on Contracts, that if the surety from whom contribution is claimed, became bound at the request of the surety who seeks to recover it, he is not liable; for in such a case the promise to contribute implied in law is negatived. 10th Am. ed. 669. The cases cited as sustaining this rule, are *Turner v. Davies*, 2 Esp. 478; *Thomas v. Cook*, 8 B. & C. 728; *Taylor v. Savage*, 12 Mass. 98; *Daniel v. Ballard*, 2 Dana, 296; *Byers v. McClanahan*, 6 Gill & J. 250; *Apgar v. Hiler*, 4 Zab. 812; *Batard v. Hawes*, 2 Ellis & B. 287.

In the case first cited, Turner sued Davies to recover a moiety of a sum paid by him on account of the debt of one Evans. The foundation for the claim to contribution against Davies was this: There being an examination in Evans' house, at the suit of one Brough, to induce the execution plaintiff to withdraw it, Turner and Davies joined in a warrant of attorney to Brough, but Davies joined in consequence of having been applied to by Turner, and also by Brough, who required an additional security. Turner, the plaintiff, at the time, took a bill of sale from Evans for his indemnity. It was held, that Davies was not bound to contribute, Turner having been compelled to discharge the debt of Evans. Lord KENYON, while resting this case specially on the ground that Turner had secured himself by a bill of sale, declared, that where one has been induced to become security at the instance of another, though he thereby renders himself liable to the person to whom the security is given, there is no pretense for saying that he shall be liable to be called upon by the person at whose request he entered into the security.

The case of *Thomas v. Cook* was where one signed as co-surety, at the request of a surety who agreed to save him harmless. It was held, that the promise to save harmless was a good defense to an action by the promisor.

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In the authority referred to in 6 Gill & J. 250, it was held, that the surety who claimed to be discharged did not sign it at the request of his co-surety, but at the request of the principal, and there was no occasion for the court to determine what would have been the law had the facts been otherwise. The same is true of the case in 12 Mass. 98.

In *Apgar v. Hiler* it was held, that where one of two sureties becomes such at the request of his co-surety and upon his promise that he will be put to no loss, he may recover the whole of what he may have been compelled to pay of his co-surety.

In *Daniel v. Ballard* it was declared, that one who becomes bound as a surety, at the instance and for the benefit of a co-surety who afterward pays the whole debt, is not liable to him for contribution.

In the case in 2 Ellis & B. the court did not consider this question.

There are other cases where the circumstances are held to rebut the presumption of a promise to contribute between sureties. In *Cutter v. Emery*, 37 N. H. 567, the first surety gave a bond to indemnify the second surety against the liability he assumed. In *Harris v. Brooks*, 21 Pick. 195, a parol agreement was held sufficient to discharge a co-surety from contribution. So, also, in *Blake v. Cole*, 22 Pick. 97.

In all these cases there was something more than a mere request by one surety to another to execute the note or paper as co-surety. There was either a promise, written or verbal, to indemnify, or a taking of security from the principal, and from either of these circumstances the courts hold such surety released from contribution.

It was held, until near the close of the last century, that the action for contribution between sureties rested alone upon the principles of equity, and could only be enforced in that jurisdiction. But in *Cowell v. Edwards*, 2 B. & P. 268, in the year 1800, it was observed by the court, that it might then be too late to hold that the action could not be maintained at law. The suit was *indebitatus assumpsit* for money paid. It may now be regarded as settled that the right of action in such cases arises out of a contract implied in law to contribute among the sureties a ratable proportion of the amount for which all are liable. This claim can be defeated by showing any circumstances which rebut the presumption of such an implied agreement. In *Blake v. Cole, supra*, it was said, "no

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question can be made of the general rule, that if one surety pays the whole debt, or more than his part, he has a right to recover at law a contribution against his co-surety. *Batchelder v. Fiske*, 17 Mass. 468. The defendant, then, must be charged, unless he can show some defense exempting him from the operation of the general rule. And for this purpose he relies upon the fact that he became surety at the request of the plaintiff's intestate, and upon his verbal promise to indemnify him."

In *Warner v. Price*, 3 Wend. 397, it was held that where the fact appeared that persons signed as sureties, "they must all be considered co-sureties, unless a state of facts be shown to the court from which it shall appear positively, or by legal intendment, that these defendants intended, as to the subsequent signer, to stand in the character of principals." See, also, *Norton v. Coons*, 3 Denio, 130, and 2 N. Y. 33.

In the case of *McNeil v. Sanford*, 3 B. Mon. 11, it was held that the circumstance that the last obligor did not sign until eight months after the other sureties were bound, was "altogether insufficient to qualify either the actual or legal import and effect of the obligation on its face, and show that he was merely a collateral guarantor of the other obligors, and not a co-obligor with each and both of them."

Are we, then, to follow the broad doctrine declared by Lord Kenyon, and the application of which was, in fact, uncalled for in the case before him—a case decided at *nisi prius*—and never heretofore applied by any court, and hold the surety discharged by the simple request of his co-surety to sign the obligation?

If a surety making the request receive any personal benefit from the execution of the obligation—as where the money raised thereon goes into his hands, or where he has already incurred a liability upon an instrument completed by delivery—we can see a propriety in the court treating the person thus benefited and making the request as a principal, and the person signing at such request as his surety only, and not liable to contribute for his benefit. So, where the signature is upon an express contract to indemnify, the consideration supports the promise and discharges the surety from the legal obligation otherwise resting upon him.

But where parties standing in an equal relation to the principal sign as sureties for that principal, the one at the request of the other, we are not satisfied that any sound principle of law or equity

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will discharge either from the legal obligation he assumes on the face of the instrument to contribute his proportion on default of the chief obligor. Indeed, the adoption of such a rule would be, in this state, contrary to the prevailing practice and understanding of parties to such contracts, and most disastrous in its consequences. Few officials present their bonds in person for execution by their friends as their sureties; but the bond is executed at the request of a mutual friend; and no one has supposed that in case of loss the liability, as between the sureties, must rest upon that friend, who has simply been most active in the promotion of a common object.

In our opinion, therefore, the averments of the sixth paragraph of the answer were not sufficient to constitute a defense to the action, and the demurrer was properly sustained.

Judgment affirmed.

SPRINGER V. DROSCH.

(22 Ind. 493.)

Contract for sale to delay creditors—Evidence.

A contract for the sale or conveyance of property, to hinder or delay creditors, is only illegal as to creditors; as between the parties and all others, it is legal and valid, and can be enforced in all its terms as any other contract.

On the trial of an action for goods sold and delivered, the defendant offered in evidence an execution and return of the sheriff, and a schedule of property attached thereto, verified by the plaintiff, in the case of a third person against the plaintiff, of a date subsequent to said alleged sale to the defendant, this claim not being included in the list.

Held, that, as an admission of the plaintiff, this was proper evidence.

J. W. Cooper, N. Purdum and M. Bell, for appellant.

D. C. Metsker, H. A. Brouse, J. W. Gordon and W. March, for appellee.

RAY, J. Complaint by appellant for goods sold and delivered, accounts and claims transferred, and services performed, claiming judgment for \$10,000.

The fourth paragraph of the answer, to which a demurrer was sustained, upon which ruling error is assigned, is as follows: "The

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defendant avers that at the time of the said sales mentioned in said complaint, the plaintiff was indebted to divers persons in the sum of \$12,000; and, for the purpose of hindering, delaying, and defrauding his creditors, said plaintiff, on his part, made said sales to the defendant."

This paragraph, it is insisted, constituted a good defense to the action, and we are cited to the case of *Moseley v. Moseley*, 15 N. Y. 334, in which the earlier case of *Nellis v. Clark*, 4 Hill, 424, is approved, where it was said to have been held, that "in an action on a promissory note, brought by one not entitled to be treated as a *bona fide* holder, the maker may defend, on the ground that the note was given in consideration of land sold for the purpose of defrauding creditors; and this, though he was himself a party to the fraud." What was actually ruled in the case cannot very clearly be determined. Chancellor WALWORTH, in his opinion, announced the rule as stated, but voted for a reversal, on the ground that the doctrine was not applicable to the case before the court. Ruger, senator, voted also for reversal, but on the ground, that "the language of the statute is clear and unequivocal, that sales or assignments made with intent to hinder, delay, or defraud creditors, are void, only 'as against the persons so hindered, delayed, or defrauded;' and it has been held that such sales are to be regarded as binding upon the immediate parties thereto, their heirs, and personal representatives. *Jackson v. Garnsey*, 16 Johns. 189; *Osborn v. Moss*, 7 id. 161. If this be so, the distinction taken by the supreme court between executory and executed contracts can have no application here."

It appears, then, that two members of the court voted for the reversal of the case, the one affirming that the contract was good between the parties, and the other denying this proposition. The case was affirmed, the chancellor and eight senators voting for reversal, and ten senators for affirmance, and thus, by a majority of one, the state senate of New York, its members learned and unlearned in legal lore, attempted to reverse the law as declared by the courts from the time of James I; and to this decision, with no citation of other authority to support it, we are referred by the court of appeals of that state, and informed that the law "should now be regarded as established."

Entertaining all proper respect for the decisions of that court, we are nevertheless reluctant to admit that the long line of rulings in

England, and in the courts of our sister states, is to be thus lightly obliterated.

In the case to which our attention is thus called, the learned chancellor devotes much space to prove that the facts in the special cases, where a doctrine adverse to the one he was contending for was announced, did not require so broad a rule as therein stated; but that the facts of each case would have been covered by a ruling, that where the contract was executed equity would regard it as valid. In the channel which the chancellor had endeavored to discover, and through which he hoped to reach his haven, after avoiding, to his own satisfaction at least, many of the barriers to his progress, placed by other courts in older times, he meets a decision which crosses the passage, and he frankly admits, to quote his own language, that "the case of *Findley v. Cooley*, 1 Blackf. 262, decided by Judge BLACKFORD and his associates, in our sister state of Indiana, does, however, directly decide the question, that, in the case of an executory contract made to defraud creditors, the defendant cannot set up the fraud as a defense to a suit brought thereon by a *particeps criminis*. It is evident, however, that the distinguished judge who delivered the opinion of the court in that case did not examine the question with his usual care and discrimination. For he lost sight of the distinction which exists between an executed and an executory contract, tainted with fraud or other illegality. And he seems to take it for granted, that if the defendant could not himself avoid the fraudulent conveyance which he had received, he was bound to pay the consideration of that conveyance to the fraudulent grantor, or those who were suing for his benefit."

To the members of the legal profession in this state, the charge that Judge BLACKFORD erred for the want of due examination and care will require to be substantiated by higher proof than the assertion of a judge who rests his opinion alone upon the case of *Smith v. Hubbs*, 1 Fairf. 71, where the judge who delivered the opinion admitted his inability to distinguish between a contract void in law and one which was in itself legal, though the motive which prompted the contract being fraudulent as to certain persons, they were permitted, and they alone, to avail themselves of that fraudulent intent, and set aside a contract legal otherwise. In fact, no distinction was detected by that court between a wager or gambling contract, and one for the sale of property where the intent to defraud a creditor existed. And yet it does not seem difficult to dis-

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tinguish that in the one case the contract is, in itself, void in law, and in the other it is legal as a contract. It is illegal to wager. It is not illegal to sell property. If there be an intent to defraud a particular person, or class of persons, as to that person, or class of persons, the sale would be void; but as to all others, the fraud would be without injury to them, and of such a fraud they could not avail themselves. As it was ruled by the supreme court of Massachusetts, the transaction is not illegal. The most that can be urged against it is, that it is voidable by creditors. But it is valid between the parties, and is binding as to every one, except he be a creditor. *Fairbanks v. Blackington*, 9 Pick. 93.

Indeed, the very careful consideration of the authorities in the case of *Findley v. Cooley*, *supra*, shows that at common law conveyances of this class were never considered void, except as to the creditors defrauded thereby.

But it is unfortunate that while directly charging the court of this state with want of "care and discrimination," the accomplished critic should have cited the case from the Maine reports decided in 1833, when that court, almost two years before the writing of his censure, had held, in the case of *Nichols v. Patten*, 18 Me. 231, that "a conveyance of chattels fraudulent and void as to creditors of the vendor, is still binding upon the parties to it; they cannot set up the fraud upon creditors as against each other; the doctrine *in pari delicto* does not there apply; and the vendee, losing his title to the property by the acts of the vendor, may recover its value against him."

Clearly, this was giving the active aid and assistance of the court in enforcing the terms of the contract, and directly in conflict with the ruling the chancellor was attempting to sustain, alone upon the authority of the supreme court of Maine.

But there were two cases which might well have been cited as sustaining the ruling in *Nellis v. Clark*, *supra* — the case of *Mason v. Baker*, 1 Marsh. 208, and that of *Norris v. Norris*, 9 Dana, 317, where it is held that the statute declaring conveyances to defraud creditors "shall be void only as to such creditors," leaves the parties still, as between themselves only, to stand on the ground of the common law, assuming that at common law such a contract could not be enforced. This conclusion is fully answered by Judge BLACKFORD, in the case already cited from our own reports: "By the common law, and by the statutes Edward III and Henry VII, as well

as by the statute 13 Eliz., conveyances to defraud creditors are not absolutely void. They have always been considered binding on the parties. Whether the statute 13 Eliz., ch. 5, is merely declaratory of the common law, or an extension of its operation, is rather an unsettled question. That it is only a recognition of the common law, is the opinion of Lord COKE. Co. Litt. 290 b. The same opinion is expressed by Lord MANSFIELD (Cowp. 434; by Chief Justice MARSHALL (1 Cranch, 316); and by Chief Justice KENT (9 Johns. 339). The contrary doctrine is laid down in *Twyne's Case*, 3 Co. 80, and in *Upton v. Basset*, Cro. Eliz. 445. In the two last cited cases it is said, that, by the common law, no person should avoid an estate made by fraud, except him who had a former right, interest or demand; whereas, the statute of Eliz., instead of being limited to former interests, extends to those whose debts arise subsequently to the fraudulent alienation. The case before us does not require an opinion on this litigated question. We barely refer to some of the authorities to remind the counsel for the defendant that if the statute of Eliz. does not authorize his client to treat as void this conveyance to which he is a party, which was admitted on the argument, his appeal to the principles of the common law is beyond the possibility of success. There is not a dictum anywhere for his position, that the English statute is in derogation of the common law. On the contrary, it is either declaratory of the common law or an enlargement of its principles."

The authority in New York and Kentucky, while in the face of the plain intent of their own statutes, finds no support in the principles of the common law. Nor are they sustained by a single authority within our knowledge.

In this state the rulings are uniform. *Findley v. Cooley*, *supra*, *Scott v. Purcell*, 7 Blackf. 66; *Laney v. Laney*, 2 Ind. 166; S. C., 4 id. 149; if we except the case of *Welby v. Armstrong*, 21 Ind. 489, which, while professing to follow the case of *Findley v. Cooley*, *supra*, announces a doctrine in conflict therewith. This case containing within itself the correction of its error, we regard it as only necessary to overrule it without further comment.

The English authorities all proceeded upon this rule. *Hawes v. Leader*, 3 Cro. Jac. 270; S. C., Yelv. 196; *Jones v. Yates*, 9 B. & C. 532; *Besser v. Windham*, 6 Q. B. 166.

In this country this ruling has been almost unbroken. *Drinkwater v. Drinkwater*, 4 Mass. 354; *Taylor v. Weld*, 5 Mass. 109;

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Reichart v. Castator, 5 Binn. 109; *Gillespie v. Gillespie*, 2 Bibb, 89; *Dale v. Harrison*, 4 id. 65; *Clapp v. Tirrill*, 20 Pick. 247; *Dyer v. Homer*, 22 id. 253, where it was held that a note given for such a consideration could be enforced; *Sherk v. Endress*, 3 Watts & S. 255, where it was ruled, that such a contract could be enforced by either party against the other in all its terms and for any purpose; *Randall v. Phillips*, 3 Mason, 378; *Byrd v. Curlin*, 1 Humph. 466; *Thompson v. Moore*, 36 Me. 47; *Eyrice v. Hetrick*, 13 Penn. St. 488; *Burgett v. Burgett*, 1 Ohio, 469; *Worth v. Northam*, 4 Ired. 102; *Hendricks v. Mount*, 2 South. 738; *Robinson v. Monjoy*, 2 Halst. 173; *Sumner v. Murphy*, 2 Hill (S. C.), 488; *Chapin v. Pease*, 10 Conn. 69; *Dearman v. Radcliffe*, 5 Ala. 192; *McGuire v. Miller*, 15 id. 394.

Nesley v. Wood, 10 Yerg. 486, is cited in a note to *Phillipotts v. Phillipotts*, 10 C. B. 84, but as the volume is not in our library, being out of print, we have not examined it. We have also omitted the earlier New York cases, as controlled by the later rulings.

Such an array of authority, however, should satisfy any one that this question is, indeed, at rest, and that the defense attempted in this case cannot avail the defendant—that a contract for the sale or conveyance of property, to hinder or delay creditors, is only illegal as to creditors; and that as between the parties, and as to all others, it is a legal and valid sale or conveyance, and can be enforced in all its terms as any other contract.

On the trial the defendant offered to introduce in evidence an execution and return of the sheriff, and also a schedule of property attached thereto, verified by the plaintiff, in the case of Keifer and others against the plaintiff. This was offered as an admission made by Drosch, this claim not being included in the list, that at a date subsequent to the alleged sale to the defendant no such cause of action existed. The evidence was refused. This was error. It was evidence tending to disprove the cause of action, and was proper for the consideration of the jury.

For this error in excluding the evidence offered, the case is reversed and remanded for a new trial. Costs for appellant.

CASES
IN THE
SUPREME COURT
OF
OHIO.

THE CLEVELAND, PAINESVILLE AND ASHTABULA RAILROAD
COMPANY, plaintiffs in error, v. CURRAN.

(19 Ohio St. 1.)

Carriers—drover's pass—Stipulations against liability for negligence.

The plaintiff made a contract with the defendant for the transportation of stock at a certain rate, wherein it was stipulated that the person riding free to take charge of the stock should do so at his own risk of personal injury, from whatever cause. At the same time, without additional consideration, the defendants gave him a "drover's pass," entitling him to go with the stock and return by a passenger train. On this pass was an indorsement stipulating that "the person accepting this free ticket assumes all risks of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents, or otherwise, for injuries to the person," nor as common carriers. The plaintiff received the pass with knowledge of its contents, accompanied the stock, and was injured on his return by the negligence of defendant's servants. *Held*, that the plaintiff was not a gratuitous passenger, and that the contract and stipulation against liability for negligence was against the policy of the law and void, and, therefore, no defense to an action for the injury.

CURRAN, the defendant in error, shipped by railroad, from Finley, Ohio, for Buffalo, New York, two car loads of hogs, in January, 1864. On arriving at Cleveland, the cars containing the hogs were transferred to the road of the plaintiff in error, and Curran went to the freight office of the plaintiff in error, and then made a contract (C.) with its agent, which provided, that, in consideration of receiving transportation at reduced rates from Cleveland to Buffalo, the

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shipper, Curran, was to assume all risks to the animals, etc., and further, "it is agreed between the parties hereto, that each and every of the persons riding free, to take care and charge of said stock, do so at their own risk of personal injury from whatever cause; and the said party of the second part (Curran), for the consideration aforesaid, hereby releases and agrees to release and to hold harmless, and keep indemnified, the said party of the first part, of and from all damages, actions, claims and suits, on account of any and every injuries, loss and damage hereinbefore referred to, if any such occur or happen," etc.

This contract was executed in duplicate, each party taking one.

Thereupon the agent filled Curran's name in a blank drover's pass, and gave it to him. This pass contained a direction to pass Curran from Cleveland to Erie, with stock, and return on passenger train. On the back of it was printed the following: "The person accepting this free ticket assumes all risk of accident, and expressly agrees that the company shall not be liable, under any circumstances, whether of negligence by their agents, or otherwise, for any injury to the person, or for any loss or injury to the property, of the passenger using the ticket, and agrees, that, as for him, he will not consider the company as common carriers, or liable as such." Curran proceeded with this pass on the train with the hogs to Buffalo, where they were delivered. He then took passage on a passenger train to return, taking a berth in the sleeping car, for which he paid extra. He traveled by virtue of his drover's pass, which was received and taken up by the conductor. During the journey the train was delayed by a snow drift, and, while so delayed, was struck by another train passing in the same direction, and the defendant in error severely injured thereby.

Curran, in his petition, alleged that the collision took place in consequence of the gross carelessness of the conductor and brakemen on the train in which he traveled, in neglecting to signal the approaching train. The company denied the negligence, and averred that Curran was a gratuitous passenger riding on a free pass issued to him, under an agreement with the company to exempt it from all liability for any injuries to his person.

At the trial the superintendent testified that the contract for the transportation of the hogs was in the usual form, "and of the kind which was alone used by the company at the time the said stock was transported for Curran; and that the company would not, at

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that time, have received and transported the hogs except under such contract."

The jury found, generally, for Curran, assessing his damages at \$2,000. They also found, specially, the following facts:

1. The company performed its contract for the transportation of the hogs.

2. Curran paid no consideration for the drover's pass, other than that expressed in the contract for the transportation of the hogs.

3. Curran knew the contents of what appeared on the face and back of the drover's pass when he received it.

4. He was injured on his return.

From the judgment entered on this verdict, the company filed its petition in error.

W. L. Perkins and James Mason, for plaintiff in error:

The contract of Curran to exonerate the company from liability is not void, as in contravention of any rule of public policy. *Wells v. The N. Y. Central R. R. Co.*, 24 N. Y. 181; *Perkins v. Same*, id. 196; *Smith v. Same*, id. 222, 228, 230, 231, 232; *Bissell v. Same*, 25 id. 442; *Wells v. Steam Nav. Co.*, 8 id. 375.

A. L. Tinker and Gatch & Walker, for defendant in error:

A carrier of passengers cannot, by special contract, exempt himself from liability for his own negligence, such contract being against public policy. *Jones v. Voorhies*, 10 Ohio, 145; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 id. 362; *Wilson v. Hamilton*, id. 722; *Welsh v. Pittsburg, etc., R. R. Co.*, 10 id. 75; *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468; *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 36; *McElroy v. Nashua & Lowell R. R. Co.*, 4 Cush. 400; *New World v. King*, 16 How. (U. S.) 469-474; *Coggs v. Bernard*, Holt, 13; *Tod v. Old Colony & Fall River R. R. Co.*, 3 Allen, 18; *Ind. Cent. R. R. Co. v. Munday*, 21 Ind. 48; *Ohio & Miss. R. R. Co. v. Muhling*, 30 Ill. 9.

WHITE, J. The controversy arising on the record in this case is embraced in two general questions.

The first we will consider is, whether Curran, the plaintiff below, was, at the time he received the injury complained of, a gratuitous passenger.

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We think he was not. The ticket called a "drover's pass" entitled him to ride from Cleveland to Erie with his stock, and to return on a passenger train. A single consideration was paid to the company for this privilege and for the transportation of his stock, and the one service can no more be said to have been gratuitous than the other. It is true the person using the ticket is referred to in the contract as "riding free," and in the indorsement on the ticket it is called a "free ticket;" but these expressions can, in fact, only mean that the holder was to be subjected to no additional charge, and that he was to pass free of the usual fare exacted of passengers. The writing "C." and the ticket were delivered at the same time, and, together, constitute one contract.

The next question is, whether the stipulation in the contract exempting the company from all liability for negligence constitutes a defense to the action.

In our opinion it does not. We regard it as settled in this state, by former decisions, that no such stipulation would exonerate the company from responsibility as a common carrier for the loss of goods caused by its own negligence; and from the principle thus established we are not inclined to recede. *Welsh v. Pittsburg, Fort Wayne and Chicago R. R. Co.*, 10 Ohio St. 65; *Graham & Co. v. Davis & Co.*, 4 id. 362; *Davidson v. Graham et al.*, 2 id. 131.

It is true, that common carriers are not insurers of the safety of passengers as they are of goods which they undertake to carry; but the principle of law which forbids their being allowed to exempt themselves from liability for the consequences of their negligence in respect to goods, applies with still greater force in the case of passengers.

The common law has a peculiar regard for human life; and for this reason exacts a greater degree of care in respect to it than in relation to any matter of mere property. *Shearman & Redf. on Negl.* § 24.

Carriers, of the class of the plaintiff in error, are creatures of legislation, and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended, by the law of their creation, to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business the necessary degree of skill and care.

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This obligation arises from the public nature of the employment, and is founded on the policy of the law for the protection of the persons and property of the public, which must of necessity be committed, to a very great extent, to the care of public carriers.

In the case of the *Philadelphia and Reading Railroad Co. v. Derby*, 14 How. 486, it was laid down, that, "when carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of gross." And in delivering the opinion in the case of the *Steamboat New World et al. v. King*, 16 How. 474, Mr. Justice CURTIS declared that the court desired to be understood as re-affirming "that doctrine, as resting not only on public policy, but on sound principles of law."

Recovery is allowed for the breach of this duty where no privity of contract exists between the injured passenger and the carrier. Thus, in *Collett v. London and Northwestern Railroad Co.*, 16 Q. B. 984, where a duty was cast by act of parliament upon a railway company to carry any officer of the post-office whom the postmaster-general might elect, for which services the company was to be remunerated by the postmaster-general, and the plaintiff was the officer elected, and was injured by the defendants' negligence in carrying him, it was held, that it was the defendants' duty to carry the plaintiff with proper care and diligence, and for the breach of such duty, to the injury of the plaintiff, he might sue the company in an action on the case, though there was no contract between him and the defendants, but the duty arose simply from the obligation imposed upon the defendants by the statute. Same case, cited in *Shearman & Redfield on Negligence*, note to § 261. And to the same effect is *Nolton v. Western Railroad Co.*, 15 N. Y. 444. See also *Marshall v. The York, Newcastle and Berwick Railroad Co.*, 2 C. B. (73 E. C. L.) 655.

Whether the general obligation resting on the company as to the care to be exercised in the management of its trains may be qualified by special contract, in cases of gratuitous services rendered in the carriage of passengers or of goods, is a question we are not called on to consider. Such cases are exceptional in their nature, and whether

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the fact that they do not practically contribute to furnish the standard by which the business is conducted should withdraw them from the operation of the general rule, is a question not raised in the case before us, and in respect to which we express no opinion.

It cannot be denied that pecuniary liability for negligence promotes care; and if public carriers in conducting their business can graduate their charges so as to discharge themselves from such liability, the direct effect will be to encourage negligence by diminishing the motives for diligence.

In New York it has been held by the court of appeals, three judges dissenting, that a common carrier, in consideration of an abatement, in whole or in part, of his legal fare, may lawfully contract with a passenger that the latter will take upon himself the risk of damage from the negligence of agents and servants, for which the carrier would otherwise be liable. *Bissell v. The New York Central Railroad Co.*, 25 N. Y. 442.

The contract in that case was similar to the one in the case now before us, and the railroad company was held not to be liable.

But in the case of the *Pennsylvania Railroad Co. v. Henderson*, 51 Penn. St. 315, it was decided by the supreme court of Pennsylvania that such a contract for exemption from liability for negligence was void, as being against the policy of the law.

In that case it appeared that Henderson, on the trip on which he was killed, shipped some live-stock to Philadelphia, and received a "*drover's pass*," being a ticket given to the person in charge of stock, there being no charge for the ticket, and the freight on the stock being the same whether any person went with it or not.

On this ticket was the following indorsement: "The person accepting this *free ticket* assumes all risks of accidents, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by its agents or otherwise, for any injury to the person, or for any loss or injury to the personal property of the party using this ticket." In an elaborate opinion by REID, J., the late New York cases were reviewed and disapproved, and it was held, that the contract imported by the indorsement was no excuse for negligence.

The former decisions of the supreme court of Pennsylvania, on the subject of such agreements, accord with the former decisions of our own court; and the decision in the case of Henderson and the

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decision we make in the present case are but the logical application of principles established in former cases.

If the distinction as to the different degrees of negligence should be recognized as applicable to this class of cases, a matter which has been questioned in some cases and denied in others, yet the act of negligence charged in this case, and which the jury must have found to have been proved, would, in its nature, clearly be an act of gross negligence.

Judgment affirmed

WHEELER v. CITY OF CINCINNATI.

(19 Ohio St. 12.)

Municipal corporation—liability for defective fire department.

A city, authorized by statute to establish a fire department and procure engines, etc., necessary to extinguish fires, is not liable to an individual whose house has been burned, for any defect in the execution of such power, nor for a neglect of duty on the part of fire companies or their officers.

THE plaintiff's house, situated in Cincinnati, was destroyed by fire, and he brought this action to recover for the damage thereby sustained, on the ground that the defendants had failed to provide the necessary cisterns and suitable engines, and that certain officers of the fire department of said city had neglected to perform their duty in regard to extinguishing the fire which burned his house, whereby it had been destroyed.

A demurrer to the petition was sustained, and the plaintiff moved for leave to file petition in error.

J. T. Crapsey and Collins & Herron, for motion.

J. Bryant Walker, for city.

BY THE COURT. The laws of this state have conferred upon its municipal corporations power to establish and organize fire companies, procure engines and other instruments necessary to extinguish fire, and preserve the buildings and property within their limit from conflagration; and to prescribe such by-laws and regulations for the government of said companies as may be deemed expe-

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dient. But the powers thus conferred are in their nature legislative and governmental; the extent and manner of their exercise, within the sphere prescribed by statute, are necessarily to be determined by the judgment and discretion of the proper municipal authorities; and for any defect in the execution of such powers, the corporation cannot be held liable to individuals. Nor is it liable for a neglect of duty on the part of fire companies, or their officers, charged with the duty of extinguishing fires. The power of the city over the subject is that of a delegated quasi sovereignty, which excludes responsibility to individuals for the neglect or non-feasance of an officer or agent charged with the performance of duties. The case differs from that where the corporation is charged by law with the performance of a duty purely ministerial in its character. We know of no case in which an action like the present has been held to be maintainable. *Brinkmeyer v. Evansville*, 29 Ind. 187; *Western College of Medicine v. City of Cleveland*, 12 Ohio St. 375.

Leave to file petition in error refused.

SINTON, plaintiff in error, v. BOYD.

(19 Ohio St. 30.)

Will—Construction—Survivorship.

A testator gave all his estate to his wife for life, with a direction that after her death it should be equally divided among his children or the survivors of them. One of the children died after the testator's death, but before that of the widow, leaving a child. Held, that no interest vested in the deceased child under the will, nor in the grandchild, she being neither one of the "children" nor "survivors."

Words of survivorship in a will should be referred to the period for the payment or distribution of the subject-matter of the gift.

THIS action was brought by Kate J. Boyd, to recover an undivided seventh of a leasehold of certain houses and lots in Cincinnati, claiming title from her grandfather, John Boyd, who held the premises under a lease for ninety-nine years, renewable forever.

John Boyd died in October, 1832, leaving a will, wherein he bequeathed his library to his sons or the survivors of them, and his household goods to his wife for life, and then to be divided among

the daughters of the survivors of them. The residue of his property he disposes of in these terms: "I also give and bequeath unto my wife my estate, real, leasehold and personal, and all moneys and proceeds that may arise from the same, or that shall be remaining in the hands of my executors after the payment of my just debts and funeral and administration expenses, to be used, employed and kept by her during her natural life for the support of herself and the support and education of my minor children. I also allow and direct that my wife shall, if she deems it proper, advance my sons, or any one of them, as they severally arrive at the age of twenty-one years, such sum of money as she may deem advisable, out of any surplus funds remaining in her hands not required for the support of herself and the support and education of my said minor children, she taking from them, respectively, for such advances, sufficient security for its repayment without interest. I also order and direct that my said wife shall draw from my said executors, on her own order, all such sum or sums of money as shall be in their hands at any time over the amount sufficient for the payment of my debts and the expenses aforesaid.

"I also order and direct that after the death of my wife all the estate and property, real, leasehold and personal, remaining (except as aforesaid), shall be by my executors, a majority or the survivors of them, divided equally among all my children, male and female, or the survivors of them; but in case the same, or any part of the same, in the opinion of my executors, cannot be fairly divided without injury thereby, then such part shall be by them sold and conveyed for the best price that can be had, and the proceeds divided as aforesaid; provided that any advances made by my wife to my sons, under the provisions for that purpose, shall first be deducted out of their respective portions; and if any shall have overdrawn his equal proportion by way of advance, the surplus shall be refunded, so as to make the portions to each equal.

"I also direct that my said executors, a majority or the survivors of them, shall lease or rent, on the best terms that can be had for the same, my houses and lots on the north side of Fifth street, between Vine and Race streets, which were leased to me by Samuel Talbert and brother, the proceeds of which, after paying ground rents and taxes, to be paid to and received by my wife for the purposes aforesaid."

The testator died leaving his widow, Mary Boyd, and eight chil-

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dren, one of which was James S. Boyd, who died, leaving a widow and one child, Kate J. Boyd, in 1836, prior to the death of the widow of the testator.

The leasehold was sold to Mary Boyd, the widow, with the consent of all the heirs except Kate J. Boyd, who was a minor. This leasehold she afterward disposed of, and it was in turn sold by her grantee to David Sinton, the plaintiff in error.

The plaintiff recovered a judgment below, and to reverse this judgment this petition in error is prosecuted.

Aaron F. Perry, for plaintiff in error.

Lewis E. Mills, for defendant in error.

DAY, J. Numerous perplexing questions have been presented in this case, but they are all founded on the assumption that Kate J. Boyd derives title under the will of her grandfather, John Boyd. If this assumption be not well founded, there is an end of the case. This, then, is the prime question to be considered.

There is no express devise to grandchildren; nor is there any thing in the will that will admit of that construction. The devise is to "children;" if, therefore, she has any interest in the estate in controversy she derives it by descent from her father, James S. Boyd, who was the child of the testator. If nothing was vested in him at the time of his death, she can inherit nothing from him.

The question, then, is whether an interest under the will vested in James S. Boyd. He survived the testator, but died before the widow, "after" whose death the property was to be divided. The property was to be divided equally among the testator's children, "or the survivors of them." It is necessary, therefore, to ascertain what was the point of time at which the survivorship was to be determined. Was it at the decease of the testator, or of his widow, who had a life interest in the property? This depends entirely upon the intention of the testator. In seeking that, we arrive at the same result, whether we apply the settled rules of the law, or are guided only by a study of the will itself.

The ancient holdings on this subject have been much modified by more recent decisions. Also the soundness of the distinction, taken between real and personal estate, has been questioned, until it has nearly or quite faded away. 2 Jar. on Wills, 650; Hawkins' Treat. 262.

The case of *Young v. Robertson*, 8 Jurist (N. S.), 825, decided in the house of lords in 1862, is directly in point. It was a will of real and personal estate to trustees, to account to the widow during her life, and, after her death, to certain grand nephews and nieces, or their survivors.

In that case it was held, "upon the authorities, as well as upon principle," to be the rule, "that where there is a clause of survivorship, *prima facie* survivorship means the time at which the property to be divided comes into enjoyment—that is to say, if there be no previous life estate at the death of the testator; if there be a previous life estate, then at the termination of that life estate:" or (as the rule is more briefly stated by the lord chancellor), that words of survivorship should be referred to the period "for the payment or distribution of the subject-matter of the gift." This is declared by him to be "the rule that is now finally established" in England.

This undoubtedly is the general rule recognized in this country, subject, of course, to such modifications as the paramount rule, giving effect to the intention of the testator, may require.

We think the general rule is the law applicable to this case, and that it is in harmony with the obvious purpose and intent of the testator, as gathered from the will.

Nor are we embarrassed by any question as to the state of the legal title to the leasehold in controversy during the life-time of the widow, for this court, in the case of *Boyd v. Talbert*, 12 Ohio, 212, held that it was vested in the executors. The legal estate, then, was not vested in the father of Kate J. Boyd during his life.

Nothing is given directly by the will to the children, except the library to the sons, and the household furniture contingently to the daughters. Every thing else is given to the wife, "to be used, employed and kept by her during her natural life for the support of herself and the support and education of the minor children." It is only that which may be "remaining" after her death that he *directs* to be divided among the children. Their interest, then, attaches at her death, and to that only which may be then *remaining*.

This view is strengthened by the provision in the will for the repayment of any advances the widow might make to the sons; nor does this provision conflict with that requiring the division to be made only among his children who might be alive at the period fixed for the distribution.

It is clear, then, that during the life of the widow no interest in

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this leasehold vested in the father of Kate J. Boyd. He died before the time for the distribution of the estate arrived; therefore, nothing vested in him or his heir, for the distribution was to be made only among the "children" of the testator that might be surviving at the time mentioned in the will for the distribution.

The testator, it would seem from the record, was an educated man, and, from the manner in which he has frequently used the words, "*survivors of them*," in his will, we cannot but think that he fully understood their meaning, and that he intended to use them in their ordinary sense, when applied to his children, as he clearly does, in the same sentence, when applied to his executors.

He directs his "executors, a majority or the survivors of them," to make the division "equally among all my children, male and female, or the survivors of them." The distribution to be made by the executors to the children, if all of each class are alive when the period for the division arrives; if not, then it is to be made by one class of survivors to the other class of survivors — that is, by those of one class then living to those of the other class then alive.

The testator has used apt words to confine the distribution of his property to his own children; and, in the absence of any thing indicating a contrary intention, it is but reasonable to presume that he intended what is imported by their ordinary sense.

We are, therefore, constrained to hold that the plaintiff, in the court below, had no interest in the leasehold for which she brought suit. It follows that it is unnecessary to consider the other questions made in the case, and that the judgment of the court below must be reversed.

THE LITTLE MIAMI RAILROAD COMPANY, plaintiff in error, v.
WETMORE.

(19 Ohio St. 110.)

Master and servant — Liability of railroad company for assaults of servant.

The plaintiff, a passenger on defendants' road, applied to the baggage-master to have his trunk checked, which not being promptly done, the plaintiff became angry and used threatening and abusive language, whereupon the baggage-master seized a hatchet and struck him. *Held*, that the company was not liable.

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THIS was an action in the court below, by defendant in error, against the railroad company, to recover damages for injury occasioned by an assault committed by one of the agents of the company, as averred, while he was acting within the scope of his employment.

The facts were, that Wetmore went with his baggage to the depot of the railroad company, and requested the baggage-master, one Halpine, to check his baggage. Wetmore testified that Halpine replied he would "check it when he got ready," and continued checking other baggage, which was arriving after that of witness. After waiting some time, and making several requests to have his baggage checked, witness went around to the inside of the counter, on which baggage was placed, and repeated his request, whereupon he was seized by Halpine and violently pushed out of the inclosure. Witness then came up again, outside of the counter, and, shaking his finger in Halpine's face, said: "You d—n scoundrel, you shall suffer for this! What do you mean by annoying me in this manner? Why don't you check my baggage?" whereupon Halpine took up a hatchet and struck witness on the head. Halpine testified that when witness came up to him first he was getting checks for some other passengers, who were there first; that Wetmore was importunate, and came inside the inclosure and used abusive language; that he had merely taken him by the arm and led him out, and that Wetmore then came up with his hand under his coat, so that witness thought he was going to draw a weapon, and witness took up the hatchet and pushed him away with the end of it.

The jury found a verdict for plaintiff for \$7,000, on which the court entered judgment. The case was now before this court on writ of error.

D. Thew Wright, for plaintiff in error, cited *Smith on Mas.* and *Serv.* 183 (2d ed.); *Story on Agency*, § 452; *Croft v. Alison*, 4 B. & Ald. 590; *McManus v. Crickett*, 1 East, 67; *Cox v. Kehey*, 36 Ala. 340; *Steamboat Ohio v. Stunt*, 10 Ohio St. 582; *Steamboat Messenger v. Pressler*, 13 id. 255; *Steamboat Ocean v. Marshall*, 11 id. 379; *Ellis v. Turner*, 8 D. & E. 533; *Foster v. Essex Bank*, 17 Mass. 509; *Mechanics Bank v. Bank of Columbia*, 5 Wheat. 326; *Crocker v. N. L. R. R. Co.*, 24 Conn. 249; *Vanderbilt v. Richmond Turnpike Co.*, 2 id. 479; *Wright v. Wilcox*, 19 Wend. 343; *Roe v. B. R. R. Co.*, 7 Eng. L. & E. 546; *Goff v. Great N. R. R. Co.*, 3 E. & E. 671; *E. C. R. R. Co. v. Brown*, 6 Exch. 314; *Poulten v. L. & N. R. R. Co.*, L.

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R. (2 Q. B.) 531; *Mitchell v. Crassweller*, 13 C. B. 237; *Story v. Ashton*, L. R. (4 Q. B.) 476; *Williams v. Jones*, 11 J. N. S. 843; *E. & C. R. R. Co. v. Baum*, 21 Ind. 70.

H. L. Burnett and *John F. Follett*, for defendant in error, cited *Pennsylvania Railroad Co. v. Vandiver*, 42 Penn. St. 371; *Joel v. Morrison*, 6 C. & P. 501; *Sleath v. Wilson*, 9 id. 607; *Powell v. Deveney*, 3 Cush. 300; Redf. on Rail., § 130 (4th ed.); *Howe v. Newmarch*, 12 Allen, 49; *Weed v. P. R. R. Co.*, 5 Duer, 193; *Moore v. F. R. R. Co.*, 4 Gray, 465; *Hewett v. Swift*, 3 Allen, 420; *Meyer v. Second Avenue Railroad Co.*, 8 Bosw. 305; *Seymour v. Greenwood*, 7 H. & N. 355; *Korah v. Ottawa*, 32 Ill. 121; *Chicago Railroad Co. v. McCarthy*, 20 id. 385; *Whatman v. Pearson*, L. R. (3 C. P.) 422.

WHITE, J. There is no controversy as to the general rule by which the question of the liability of the railroad company for the act complained of in the petition is to be determined. The difficulty arises in the application of the rule to the peculiar facts of the case. Halpine, the person guilty of the wrong, as the servant of the company, was charged with the duty of checking the baggage of passengers; and whatever liability, if any, devolved upon the company for the consequences of his wrongful acts, grew out of the relation of master and servant which existed between him and the company.

The general rule as to the liability of the master for the wrongful acts of his servant is thus stated by Mr. Smith in his work on master and servant: "A master is ordinarily liable to answer in a civil suit, for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in his master's service. The maxims applicable to such cases being *respondeat superior*, and that before alluded to, *qui facit per alium facit per se*. This rule, with some few exceptions, which will hereafter be pointed out, is of universal application; whether the act of the servant be one of omission or commission, whether negligent, fraudulent or deceitful, or even if it be an act of positive malfeasance or misconduct, *if it be done in the course of his employment*, his master is responsible for it *civiliter* to third persons." Smith's M. & S. p. 151.

But, to make the master responsible, the act of the servant must be done in the course of his employment, that is, under the express or implied authority of the master. Beyond the scope of his employ-

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ment, the servant is as much a stranger to his master as any third person, and the act of the servant, not done in the execution of the service for which he was engaged, cannot be regarded as the act of the master. *Id.* s. p. 160; *Shear. & Redf. on Negl.* §§ 59, 62; *Larup v. London Genl. Omnibus Co.*, 1 Hurl. & Colt. 541; *Foulton v. London & Southwestern R. R. Co.*, L. R. (2 Q. B.) 535.

That there was in this case no express authority given to the servant is conceded. Can such authority be implied under the circumstances of the case from the nature of the business intrusted to his charge? The company contends that it cannot; and the tenth instruction was asked on the grounds that there was no evidence tending to show such authority. For the plaintiff below, it is insisted that the servant was impliedly invested with such powers as were essential to the regular and certain performance of his duties; that for the dispatch of his business, in certain emergencies, he must be considered as authorized to suppress by force, if necessary, any interference with, or obstruction of, the quick and certain discharge of his duties.

Without undertaking to lay down a general rule to govern all cases, it may safely be admitted that the servant is invested with authority to use the necessary means to the performance of the duties assigned him; and that the character of the means that may be used will vary according to the nature of the duty to be performed and the attending circumstances.

But, in looking at the evidence, it is to be noticed that the assault complained of was not committed in endeavoring to eject the plaintiff from the space inclosed by the tables, over which the servant may be supposed to have had a special control. The plaintiff, according to his own statement, had gone outside of the tables, and was shaking his finger in Halpine's face, and addressing him with an opprobrious epithet.

It seems to us the assault was in no way calculated to facilitate or promote the business for which the servant was employed by the master; nor could it have been supposed to be, or intended as, an act done with that view or object. It is not a case of excess of force and violence in executing the authority of the master but rather an act beyond such authority and foreign to the objects of the employment. There was no evidence tending to show that Halpine had any charge of the portions of depot not allotted for the purpose of checking baggage; neither did his employment imply

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any authority or control over the persons of passengers or others who might be found there. Nor is this the case of an act done from a wrong judgment in regard to a matter committed by the master to the discretion of the servant.

Another ground assumed is, that the assault was an act of the servant done in part execution of the contract of carriage between the plaintiff and the company.

This is merely presenting the question in a different form, the principle being the same as that already referred to, namely: whether the act was done in the execution or performance of the service for which the servant was engaged. Whether the service to be rendered by the master is in the performance of a contract, or in the discharge of any other duty resting on him, can, it is conceived, make no difference; the question being, in either case, whether the act is within the scope of the servant's express or implied authority in respect to the master's service.

In order to withdraw this case from the operation of the general rule, and hold the company responsible on the ground of its contract with the plaintiff as a passenger, it is necessary to maintain that the company is requiring the plaintiff to apply to its servant for the purpose and as the only means of getting his baggage checked, impliedly undertook to vouch for and warrant the good conduct of the servant toward the plaintiff while the two were engaged in transacting the business. Whether this position is tenable we do not find it necessary, in the decision of the case now before us, to express a definitive opinion. The case was not tried on this theory in the court below, nor has this phase of the question been argued here.

But if any such rule of liability could be applied against the company, it would necessarily impose the reciprocal duty upon the plaintiff to so demean himself toward the servant as not, by misbehavior, to provoke a personal quarrel between them.

The evidence of the company on the trial tended strongly to prove that the plaintiff, by his importunate conduct and abusive language toward the servant, provoked a personal quarrel between them; that the assault was the result of this quarrel; and that the blow was inflicted by the servant as an act of personal resentment. If these facts had been found by the jury, the wrongful act of the servant in striking the plaintiff could not be regarded as authorized by the master, nor as an act done by the servant in the execution of

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the service for which he was engaged by the master. The fact that the blow was inflicted with a hatchet furnished by the master to be used for a wholly different purpose, though in connection with the servant's business, was wholly immaterial as respects the liability of the master. If he would not otherwise have been liable for the assault, the fact that it was committed with *his* hatchet did not contribute to make him so.

The existence of the quarrel and its bearing upon the character of the assault was not noticed in the charge. And if the jury found the quarrel to have been of the character which we have stated the evidence tended to show it, they were not advised as to the influence it might properly have in enabling them to determine whether the assault was an act done in the course of the servant's employment, or was merely his own personal act.

It is true, the charge stated the general rule correctly. But the difficulty encountered by the jury, as shown by the nature of the case and by the questions they propounded to the court, was to ascertain how to apply the general rule to the peculiar facts of the case in making up their verdict.

The reference made in the charge to the use for which the hatchet was provided was calculated, we think, to make an erroneous impression on the jury on the very point on which their verdict hinged. And, furthermore, the charge, from the generality of its terms, failed to give the jury the assistance they ought to have received in view of the facts of the case.

A charge, though not strictly objectionable in point of law, but which leaves the jury to draw an incorrect inference from facts in the case material to the issue, will constitute good ground for a new trial, where it is reasonable to suppose, from a consideration of the whole evidence, that a different verdict would have been rendered if the jury had been fully instructed. The charge ought not only to be correct, but to be so adapted to the case and so explicit as not to be misconstrued or misunderstood by the jury in the application of the law to the facts as they may find them from the evidence. *Grah. & Water. on New Trials*, 774; 18 Me. 436; 30 Conn. 343.

Judgment reversed and cause remanded for a new trial.

NOTE. — See *Goddard v. Grand Trunk Railway Company*, ante, 80; also, *Atlantic and Great Western Railway Co. v. Dunn*, post.—REF.

Mullen v. Stricker.

MULLEN, plaintiff in error, v. STRICKER.

(19 Ohio, 135.)

Easement of light and air—Implied grant.

The owner of two adjacent lots, having dwelling-houses thereon, conveyed one to the plaintiff and the other to the defendant, by deeds containing covenants of warranty and against incumbrance. The house purchased by plaintiff received light and air through windows opening upon an area on the lot purchased by defendant. The defendant being about to obstruct these windows by building upon and filling up the area, the plaintiff brought suit for an injunction. *Held*, that there was no grant of an easement for light and air implied from the fact that the windows were in use at the time of the conveyance, and were necessary to the convenient enjoyment of the property, and that an injunction could not be granted.

THIS was an action to enjoin the plaintiff in error from obstructing the windows in the house of defendant in error.

Prior to April, 1866, one Deitrich owned two adjacent lots, 51 and 53, in the city of Cincinnati, on each of which was a four-story brick house. The house on lot 51 covered the entire lot, and its south wall was a partition wall, and its center the dividing line between the two lots. Between this wall and the house on lot 53 was an alley or open space extending part the length of the wall, and some four or five feet in width. Several of the windows in the house on lot 51 opened upon and was lighted from this area. On the 24th of April, 1866, Deitrich sold both lots at auction, lot 51 being struck off to the defendant in error, and the sale was completed by the delivery of the deed on the 30th of that month. The other lot was struck off to another person, who having failed to fulfill, it was purchased by Mrs. Mullen, she receiving her deed one day after the defendant in error. Both deeds contained covenants of warranty and against incumbrances, and in both the dividing line between the lots was described as the center of the partition wall. It was admitted that substitutes for the windows opening on the area could be had by openings from above, but at considerable cost.

A perpetual injunction was granted against Mrs. Mullen, restraining her from obstructing the windows, from which judgment she brought her petition in error.

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Hoadley, Jackson & Johnson, and J. & R. A. Johnston, for plaintiff in error.

Stallo & Kittredge, for defendant in error.

WELCH, J. The whole case is a question of the construction of Deitrich's deed to Stricker. If Stricker has any right to the easement in controversy he acquired it by that deed. That the deed does not expressly grant the easement is admitted. Its language is unequivocal, making the "partition wall" the dividing line between the two lots. Nor is it claimed that the easement had attached or became appurtenant to lot 51, by user or prescription. On the contrary it is conceded, and so we understand the law to be in Ohio (*Hieatt v. Morris*, 10 Ohio St. 523; Washb. Easm. 497), that no prescriptive right to the use of light and air through windows can be acquired by any length of use or enjoyment. But it is claimed that the easement is granted by implication, arising upon the circumstances surrounding the execution of the deed. In other words, it is claimed that the grant is to be implied from the fact that the windows were in use at the time of the conveyance, and were necessary to the convenient enjoyment of the property, and that this implication is not rebutted by the fact that the lots were simultaneously sold at auction.

In the view we take of this case it is unnecessary to consider the effect of the circumstance that the lots were simultaneously sold at auction. In a proper case, no doubt, that fact might go far to rebut the implication of a grant, and there are a number of decisions to that effect. In such a case it would, perhaps, be quite immaterial which deed was executed first, as the parties to the first deed would be held to have known and intended, at the time of its execution, that the other deed was to be executed also, and was to be made conformable to the terms and conditions of the sale, neither purchaser having any preference over the other. But we place our decision of the case upon other grounds, and need not, therefore, discuss the question whether it is varied by the fact that the lots were simultaneously sold.

Nor do we deem it necessary to discriminate between the case of an implied grant and that of an implied reservation in a grant. Some of the early English decisions stand upon the ground of such a distinction, holding that the same circumstances, of necessity or

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use, which would support an implication of grant, where the *dominant* estate is first sold, will not support an implication of reservation where the *servient* estate is first sold.

What we hold is, that the law of implied grants and implied reservations, based upon necessity or use alone, should not be applied to easements for light and air over the premises of another in any case. In our view, therefore, the law of the present case is not in the least varied by the fact, that the dominant estate was conveyed first, or by the fact that both lots were sold at the same time. It seems to us that this doctrine of easements in light and air, founded upon sheer necessity and convenience, like the kindred doctrine of "ancient windows," or prescriptive right to light and air by long user, is wholly unsuited to our condition, and is not in accordance with the common understanding of the community. Both doctrines are based upon similar reasons and considerations, and both should stand or fall together. They are unsuited to a country like ours, where real estate is constantly and rapidly appreciating, and being subjected to new and more costly forms of improvement, and where it so frequently changes owners as almost to become a matter of merchandise. In cases of cheap and temporary buildings, the application of the doctrine would be attended with great uncertainty, and be a fruitful source of litigation. It would, moreover, in many cases, be a perpetual incumbrance upon the servient estate, and operate as a veto upon improvements in our towns and cities. It will be safer, we think, and more likely to subserve the ends of justice and public good, to leave the parties, on questions of light and air, to the boundary lines they name, and the terms they express in their deeds and contracts.

We know that the authorities on this subject are not uniform; but we believe the weight of American decisions are in accordance with the opinion here expressed. See *Maynard v. Esher*, 17 Penn. St. 222; *Haverstick v. Sipe*, 33 id. 368, 371; *Dodd v. Burchell*, 1 H. & C. 112; *Myers v. Gimmel*, 10 Barb. 537; *Palmer v. Wetmore*, 2 Sandf. S. C. 316; *Collier v. Pierce*, 7 Gray, 18.

In *Haverstick v. Sipe* the court hold, that the grant of an easement for light and air is not implied from the fact that such a privilege has been long enjoyed, and that a contract for such privilege is not implied, on the sale of a house and lot, from the character of improvements on the lot sold and the adjoining lots. The court say: "There is a sort of necessity for such an implication

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relative to other apparent easements, such as roads and alleys, in order to account for a use of another man's land, that would otherwise be a wrongful encroachment; and the implication is easily framed or defined, for it appears on the ground. But how can we define an easement for light and air by implication, without arresting all change in the style of buildings, all enjoyment of a man's house, according to the demands of a growing or improving family? A purchaser of a house in a crowded town never supposes that his neighbor will have a right to prevent him from changing the form of it according to his taste."

We fully concur in the opinion thus expressed, and in the reasoning upon which it is based.

Judgment reversed, and cause remanded for a new trial.

THE ATLANTIC & GREAT WESTERN RAILWAY COMPANY, plaintiff
in error, v DUNN.

(19 Ohio, St. 162.)

Corporations—liability to exemplary damages

A corporation is liable to exemplary or punitive damages for such acts, done by its agents or servants, acting within the scope of their employment, as would, if done by an individual acting for himself, render him liable for such damages.

THIS was an action to recover damages suffered by plaintiff—defendant in error here—by reason of being ejected from the cars of defendant, plaintiff in error here.

The plaintiff alleged and introduced evidence tending to prove that he purchased at Cleveland a ticket for a passage over defendant's road, from that place to Meadville. That, shortly after leaving Cleveland, the conductor of the train took his ticket, with those of the other passengers. That afterward, and when the train had reached a point about thirty miles from Meadville, he again demanded his ticket, and, after refusal, stopped the train in an uninhabited part of the country, and at about the hour of midnight, and refusing to allow him to ride any further, forcibly ejected him from the car and left him.

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The defendant denied, and attempted to prove that the plaintiff only bought a ticket from Cleveland to Warren, and that, after reaching Warren, the plaintiff sought, by misrepresentations to the conductor, to fraudulently obtain passage to Meadville, and that the conductor, on his refusing to produce a ticket or pay the fare to Meadville, stopped the train and requested the plaintiff to leave the cars, as he was required to do by the rules of the company; but that he used no violence or insulting language.

The judge charged the jury that if the plaintiff purchased a ticket from Cleveland to Meadville, and gave it up to the conductor, and the conductor ordered him to leave the car, honestly supposing that he had not paid his fare beyond Warren, using no personal violence or unnecessary severity in setting him off, the plaintiff was still entitled to recover for loss of time, expenses and inconveniences suffered by him; but that, if the conductor treated him in an insolent and insulting manner, they might go further, and give him in addition such damages as they might think proper to compensate him for injuries to his sensibilities; and also, that in case they found that the conductor had been insulting, they might allow, in addition to the above, a sum sufficient to cover his reasonable attorney's and counsel's fees in the case. The jury found for the plaintiff, assessing his damages at \$125.

The defendant excepted to the charge and assigned it as error.

Ranney & Tyler, for plaintiff in error.

Hutchins & Ingersoll, for defendant in error.

BRINKERHOFF, C. J. The question presented by the record in this case is, whether a corporation may be held liable to exemplary or punitive damages for such acts, done by its agents or servants acting within the scope of their employment, as would, if done by an individual acting for himself, render him liable for such damages.

That such damages may, in a proper case, be recovered against an individual party acting for himself, is settled in this state by the case of *Roberts v. Mason*, 10 Ohio St. 277, to which the court below, in its charge to the jury, referred; but whether the same doctrine is, in any case, applicable to corporations acting through their servants or agents, is a question which has not heretofore been

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determined in this state by the court of last resort. The question is one of much practical importance, both to corporations and the public, with which they deal and come in contact, and we have endeavored to give to it a careful consideration; and, having done so, a majority of the court find ourselves constrained to answer the question in the affirmative.

In our deliberations on the question, and looking to the adjudications of courts outside of Ohio, we find no settled or decidedly preponderant course of decision upon it. The cases are irreconcilably conflicting; and the only aid we can derive from them is through the suggestions of legal principles which they contain.

The foundation principle which governs these cases, it seems to us, is found in the maxim *qui facit per alium facit per se*. The act of the servant, done within the scope and in the exercise of his employment, is in law the act of the master himself.

And "this legal unity of the principal and agent," says the supreme court of Mississippi, in *New Orleans, Jackson and Great Northern R. R. Co. v. Bailey*, 40 Miss. 453, "in respect to the wrongful or tortious, as well as the rightful, acts of the agent, done in the course of his employment, is an incident which the law has wisely attached to the relation, from its earliest history."

And Blackstone in his commentaries says: "The master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same—that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong." Vol. 1, p. 431.

In Story on Agency the law is thus stated: "It is a general doctrine of law, that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or coöperated in those acts or misdeeds, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances, and omissions of duty of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in, or, indeed, know of, such misconduct, or even if he forbade the acts, or disap-

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proved of them. In all such cases the rule applies, *respondet superior*; and it is founded upon public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case, the principal holds out his agent as competent, and fit to be trusted; and, thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency." § 452.

Now this general doctrine, as to the legal identity of principal and agent, is fundamental. It is established. We are not at liberty to ignore or disregard it; and no one even dreams that it ever will, or ever ought to be, abrogated. And resting as it does on sound principles of public policy and regard for the public convenience and safety, it seems to me to apply with peculiar propriety to corporations — which are capable of action only through the medium of agents, and which touch, infringe upon, and come in contact with, individual persons and the public only by means of their agents and servants.

In *Philadelphia, Wilmington, and Baltimore R. R. Co. v. Quigley*, 21 How. (U. S.) 202, it was held that a railroad corporation might be guilty of acting maliciously, and so render itself liable to damages for the publication of a libel, although it acted, and could act, only through the medium of agents. And CAMPBELL, J., delivering the opinion of the court in that case, says: "The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible, as an individual is responsible in similar circumstances." And it is furthermore noticeable in that case, that the charge of the circuit court to the jury, to the effect that they were at liberty to award exemplary or punitive damages, was held to be erroneous, solely for the reason — as in *P., Ft. W. and C. Railroad Co. v. Slusser*, decided by us at this term, *ante*, 157 — that the facts by which the wrongful act was characterized did not make a proper case for the application of the rule on the subject, had it been done by a natural person.

But, the legal identity of the master and servant being admitted, and the legal consequence — that the master is responsible in damages for the wrongful acts of the servant done within the scope of his employment, the particular question still remains, whether such damages can properly and legally transcend the measure of compen-

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sation merely ; or may they, in a proper case, be given to the extent of exemplary or punitive damages, as in cases against a natural person ? In answer to this query, it is proper to inquire what is the ground of reason and principle on which exemplary damages are allowable in any case ? The answer is ready and clear. Nobody will dispute it. It rests not on the ground of abstract or theoretical justice, but on the ground of public policy—a policy which seeks to promote the public safety ; to punish, through the medium of a civil proceeding, a fraudulent, malicious, insulting or willful wrong-doer, and to hold him up as a warning example to others, to deter them from offending in like manner. Now, why do not the same considerations of public policy apply as well to corporations as to natural persons ? I am unable to see why they do not. Corporations, embodying, as they often do, the concentrated wealth and influence of many individuals, certainly may have the *power* to do injury at least equal to that of natural persons ; and it seems to me that the history of corporations affords no satisfactory guaranty that they may not use that power for purposes inimical to individual and public interests, unless restrained by a consciousness of amenability to effective legal penalties.

The legislative policy of our state has been exceedingly liberal toward railroad corporations, in delegating to them, to a liberal extent, its sovereign power of eminent domain ; in the unlimited discretion accorded to them in the selection of their routes ; in the legal facilities afforded them for raising the means for the construction of their roads ; in authorizing consolidations with other companies, and in the enactment of penal statutes for their protection. Directly and incidentally they contribute much to the wealth and convenience of our people ; but the wealth that controls them is largely held by persons outside of our state, and is constantly changing hands ; and individual stockholders feel but little personal responsibility for wrongs which may be done by their servants to individuals placed within their power. Practically, they have almost a monopoly of the means of travel. Millions of persons annually pass under the control and within the power of their servants. And unless the public, through the medium of our laws, retain the means to exercise an effective restraint upon any tendency to wrong-doing to which they may be subject, and especially in respect to the care, or the want of it, with which their servants

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may be selected, it seems to me there is so much danger of the abuse of power in this direction as to forbid the recognition of a distinction between *them*, acting through agents, and individuals acting in their own proper persons, in respect to the liabilities consequent upon tortious action. The actual management of such corporations is apt to fall into the hands of either a single individual, or of a small and closely associated number of individuals; and the danger is, that such persons will be led by a spirit of nepotism or personal favoritism, or by false notions of economy leading them to fix the compensation for the services of their servants at a rate inadequate to secure the services of competent and trustworthy men, to forget the higher and paramount duty due to the public in this particular, unless the stern, but just and discriminating, hand of the law is kept constantly visible before them.

Delivering the opinion of the supreme court of New Hampshire on this question, PERLEY, C. J., says: "If a corporation like this railroad is guilty of an act or default, such as, in the case of an individual, would subject him to exemplary damages, we think the same rule must be applied to the corporation." * * * "According to the general theory of the common law, crimes are prosecuted and punished by the state alone. Individuals are not supposed to have any private interest in the punishment of public offenses. And so, on the other hand, *as a general rule*, the plaintiff in a civil action recovers a mere compensation for his private injury." He adds: "It is, however, extremely well settled that exemplary or vindictive damages may in certain cases be recovered; and this is perhaps in accordance with the legislative policy which has given pecuniary penalties in numerous instances to private prosecutors of certain offenses. Where the wrong done to the party partakes of a criminal character, though not punishable as an offense against the state, the public may be said to have an interest that the wrongdoer should be prosecuted and brought to justice on a civil suit; and exemplary damages may in such cases encourage prosecutions where a mere compensation for the private injury would not repay the trouble and expense of the proceeding." *Hopkins v. The Atlantic and St. Lawrence Railroad*, 36 N. H. 9.

We cannot say, as in the case of the *P., Fort W. and C. R. R. v. Slusser*, above referred to, that this is not a case for exemplary damages, for the evidence is not fully set forth in the record; and

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the facts which the bill of exceptions declares the evidence of the plaintiff below *tended* to prove are such as authorized the court to submit the question to the consideration of the jury.

Judgment affirmed.

WELCH and DAY, JJ., dissented.

NOTE.—See *Goddard v. Grand Trunk Railway Company*, ante, 39; also, *Little Miami Railroad Company v. Wetmore*, ante.—REP.

 PRESCOTT V. THE STATE

(19 Ohio St. 184.)

Constitutional law — Trial by jury — Commitment to reformatory school.

A statute authorizing the grand jury, where an infant under the age of sixteen years is charged with crime, and the charge appears to be supported by evidence sufficient to put the accused upon trial, instead of finding an indictment, to return to the court that the accused is a suitable person to be committed to the house of refuge, and directing the court thereupon to order the commitment without trial by jury, is constitutional.

THE grand jury of Van Wert county, in pursuance of a statute set out in the opinion, made return to the court that Benjamin Prescott was charged before them with arson; that they found the accusation to be true; that it was supported by evidence sufficient to put him on trial; that he was a male infant under sixteen years, and that he was a suitable person to be committed to the guardianship of the directors of the house of refuge, or to the reform farm.

The court thereupon ordered Prescott to be committed to the reform farm until he became of age, or was reformed and duly discharged according to law.

Prescott was accordingly committed to the reform farm, and this writ was prosecuted on his behalf, to reverse the order and judgment of the court.

Barr & Glenn, for plaintiff in error.

James L. Price, for the state.

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WHITE, J. The proceedings disclosed in the record were had under the eighth section of the act to authorize the establishment of houses of refuge (1 S. & C. Stat. 690), and the statutes subsequently enacted enlarging the operation of that act so as to authorize commitments to be made to "The State Reform Farm" from any county in the state. S. & C. Stat. 1380, 1381; S. & S. Stat. 388.

The decision of the case depends upon the validity of the section named, which provides: "If any accusation of the commission of any crime shall be made against any infant under the age of sixteen years, before any grand jury of the county, * * * and the charge appears to be supported by evidence sufficient to put the accused upon a trial, the grand jurors may, in their discretion, instead of finding an indictment against the accused, return to the court that it appears to them that the accused is a suitable person to be committed to the guardianship of the directors of the house of refuge, and the court shall thereupon order such commitment."

The subsequent legislation authorizes the commitment to be made to the guardianship of the board of commissioners for reform schools, who are invested by law with the care and control of the reform farm.

In the assignments in error it is claimed that the statute in question is in conflict with article 5 of the amendments to the constitution of the United States; also with sections 5 and 10 of article 1 of the constitution of the state.

The amendment to the constitution of the United States referred to has no bearing on the case. That provision does not operate as a limitation of the power of the state governments over their own citizens, but is exclusively a restriction upon federal power. This has been repeatedly decided by the supreme court of the United States, and, in the late case of *Twitchell v. The Commonwealth*, 7 Wall. 321, was not regarded as an open question.

The provisions referred to in our state constitution relate to the preservation of the right of trial by jury, and to the rights of the accused in criminal prosecutions. We do not regard this case as coming within the operation of either of these provisions. It is neither a criminal prosecution nor a proceeding according to the course of the common law, in which the right to a trial by jury is guaranteed.

The proceeding is purely statutory; and the commitment, in cases like the present, is not designed as a punishment for crime, but to

place minors of the description, and for the causes specified in the statute, under the guardianship of the public authorities named, for proper care and discipline, until they are reformed, or arrive at the age of majority. The institution to which they are committed is a school, not a prison; nor is the character of their detention affected by the fact that it is also a place where juvenile convicts may be sent, who would otherwise be condemned to confinement in the common jail or the penitentiary. 4 Whart. 11.

In this proceeding in error the facts found in the record must be taken as true; and these facts show the plaintiff in error to be a proper subject for commitment to the reform farm. But in a direct proceeding to determine the legality of the detention, the records could only be regarded as *prima facie* evidence of the facts found.

No provision is made by the statute for making a defense to the charge preferred, nor for requiring notice to be given of the pendency of the proceeding. It would doubtless be proper for the court, where it was practicable, before making an order of commitment, to require such notice; but it does not seem to be required.

Owing to the *ex parte* character of the proceeding it is possible that the commitment of a person might be made upon a false and groundless charge. In such case neither the infant nor any person who would, in the absence of such commitment, be entitled to his custody and services, will be without remedy. If the remedy provided in the 20th section should not be adequate or available, the existence of a sufficient cause for the detention might, we apprehend, be inquired into by a proceeding in *habeas corpus*.

It is true the 19th section provides that it shall be a sufficient return to a writ of *habeas corpus* that the infant was committed to the guardianship of the directors, and that the period for his discharge had not arrived; and the section further provides that the existence of the circumstances justifying the commitment shall not otherwise be examinable than in an action as provided for in the act. But we regard it as questionable whether this section can operate to restrict the power of a court, invested by the constitution with jurisdiction in *habeas corpus*, from inquiring fully into the cause of the detention of a person restrained of his liberty.

Judgment affirmed.

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THE CINCINNATI, HAMILTON AND DAYTON, AND DAYTON AND
MICHIGAN RAILROAD COMPANY V. PONTIUS.

(19 Ohio St. 231.)

Carriers — Liability beyond line.

The defendant, a railroad company, whose road extended from Cincinnati to Dayton, was engaged in shipping goods from Cincinnati to New York, under an agreement with other companies, whose roads extended from Dayton to New York, for rates of through freight to be fixed by the receiving company, and collected by the delivering company, and divided *pro rata* among them. The defendant received goods at Cincinnati consigned to New York, and gave a bill of lading therefor, stating therein that the goods were to be transported by its line to its terminus, and then delivered to the connecting line; it being further agreed, that, in case of loss during transportation, the company alone in whose custody they were at the time of the loss should be held liable. *Held*, that defendant contracted to carry the goods to Dayton only, and was not responsible for loss happening on connecting line.

ACTION to recover \$1,882, damages alleged to have been sustained by reason of the failure of defendants, plaintiffs in error, to transport and deliver a quantity of apple-butter.

The defendant was a railroad company, whose road extended from Cincinnati to Dayton, where it connected with the Atlantic and Great Western railroad, running to Salamanca, in the state of New York, which latter road, at that point, connected with the New York and Erie railway, running to New York city.

The defendant was engaged in shipping goods to New York city under an agreement with these connecting lines, by which the receiving company fixed the rate of freight for the whole distance, and the delivering company collected the amount of the consignee, dividing it afterward among the companies in proportions agreed upon.

The plaintiffs delivered to the defendants, for transportation to New York city, a quantity of apple-butter, and received therefor a bill of lading, wherein the receipt of the goods was acknowledged, to be transported by the Cincinnati, Hamilton and Dayton and Dayton and Michigan Railroad Company to its terminus (Dayton), and there delivered to the agents of connecting steamboats, railroad companies or forwarding lines, on the following terms and conditions, viz. (among others): "It is further stipulated and agreed, that,

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in case of any loss, detriment or damage done to or sustained by any of the property herein receipted for, during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor, in whose actual custody the same may be at the time of the happening of such loss, detriment or damage," etc.

The goods were duly transported by the defendants to the terminus of their line, and there delivered to the Atlantic and Great Western Railroad Company, which, in turn, promptly transported the same to Salamanca, and there delivered it to the New York and Erie Railroad Company. The latter delayed so long in delivering the apple-butter to the consignee, that the market was lost and it could not be sold.

To recover the damage thereby occasioned, this action was brought. A judgment was entered after the trial for the plaintiffs, and this was assigned as error.

S. & S. R. Matthews, for plaintiff in error.

T. W. Bartley, for defendants in error.

WELCH, J. The real question in this case is, What was the contract between the parties—did the company agree to carry the apple butter all the way to New York, or only to Dayton? Upon either construction of their contract, the law fixing the rights and liabilities of the parties seems to be reasonably well settled.

If the contract was to carry to Dayton only, there can be no pretense that it was not fully performed on the part of the railroad company. The goods were carried to Dayton in due time, and there safely delivered into the hands of another company, according to agreement.

On the other hand, if the contract is to be held as an undertaking to carry the goods to New York, what are the rights and liabilities of the parties?

It does not seem to be denied that the company had the legal capacity to make such a contract, or, which is the same thing in effect, that it is estopped from denying its capacity to do so. That such is the settled law seems to be now well established. 2 Reif. on Railways, p. 9, sec. 152; *id.* p. 161; *M. & W.* 421; 21 Conn. 570; 27 Vt. 399; *id.* 110.

It is equally well settled, in Ohio at least, that a common carrier cannot, by any stipulation in his contract, or by any notice to the

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other party, exempt himself from liability for negligence or default of himself or agents. 2 Ohio St. 131; 4 id. 375; 10 id. 65; and *C. P. & A. R. R. Co. v. Curran* (decided at the present term of this court), *ante*, 1. He may, by such means, exempt himself from liability as insurer of the property against accidents and unavoidable losses, but not against those arising from the acts or omissions of himself or his servants. It is quite clear, therefore, that if the company had made a contract to carry to Dayton only, and a similar proviso had been inserted against liability for loss happening on the company's own road, the proviso would have been void, at least as to any loss occasioned by negligence or default. Now, if the contract is to be regarded as an undertaking to carry to New York instead of Dayton, why should not the same rule of law apply? The same reasons of public policy seem to exist. The only essential difference is, that in the latter case the distance covered by the undertaking is increased, and the number of the carrier's agents is multiplied; and perhaps I might add, the company is assuming to exercise doubtful powers in making the contract. It is difficult to see any reason in either of these facts for relaxing the rule of law in favor of the latter description of contract. Besides, if this was in fact a contract to carry the goods to New York, the company, in making it, was not and could not be acting as agent for any other carriers, and no one would be bound by it but itself. In that case the company's delivery of the goods to the next carrier at Dayton would create no contract, express or implied, between that carrier and the consignor, and would give the latter no right of action against the former, because the delivery would not be made as agent of the consignor. Between the consignor and the second carrier there would be, in that case, no connection. As between them, the goods, though in fact in the hands of the second carrier, would be, in law, in the hands of the original party; and if the consignor had no remedy against the original party, he would have no remedy against any one. The same rule of public policy which denies the right of exemption from loss arising from fault or negligence, and the same reasons supporting it, apply equally to such cases as it does to contracts for carriage upon the carrier's own road. Were the law otherwise, it would be in the power of one company to monopolize the business on the road of another, and thus escape the obligation and duty to the public of conducting that business with proper skill and care, which it was the object of the rule in question to enforce.

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We think, therefore, that if the contract in question is to be regarded as an undertaking to carry the goods to New York, the company is liable for this loss. It occurred at Salamanca, while the goods were *in transitu* upon the line covered by the contract, and resulted from the negligence and default of the employees of the plaintiff in error, who was the carrier for the whole route, and who was the only party contracting with the owners, the defendants in error.

But what was the contract? Was it an undertaking to carry to New York, or was it an undertaking to carry to Dayton? The parties have put their contract in writing, in the form of a receipt and agreement. This written contract determines their rights, and cannot be contradicted by parol proof. 4 Ohio, 334; 4 Ohio St. 362. It acknowledges the receipt of the goods, "to be transported *by the Cincinnati, Hamilton and Dayton and Dayton and Michigan Railroad Company to its terminus, and there delivered,*" with a proviso that the company's liability shall cease upon such delivery. Language could not be much plainer. Surely this bill of lading, apart from the mere description of the goods, imports that the undertaking was to carry the goods no further than to Dayton, the terminus of the company's own railroad, and to assume the liability of carriers only to that point.

Is this plain reading of the written contract to be contradicted and set aside by the fact that the goods were destined and marked for New York, and were described as being so marked in the bill of lading? It was surely in the power of the parties, notwithstanding the destination of the goods, to make an express agreement that the company should only take them to Dayton. And had they undertaken to make such an agreement, they could hardly have embodied in it language more plain and direct than that they have used. No case is shown, English or American, where an explicit contract like this has been held to be overruled or varied by the simple fact that the goods were received with the knowledge that they were consigned to a more distant point than that specified in the contract. The cases cited by counsel, and the argument founded upon them, are merely to the effect that such fact is sufficient *prima facie* evidence of a contract to carry the goods to their ultimate destination. This is now apparently settled as the law in England. The American cases are conflicting upon the question. But all the cases, so far as known to us, seem to proceed upon the admission that it can

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be no more than *prima facie* evidence; that it is competent for the parties, by express stipulation or otherwise, to negative the presumption. It is, therefore, only in the absence of such express agreement that the question can arise. We need not decide this question now; for if it be admitted that the consignment marks upon the goods are, in the absence of a contrary agreement, *prima facie* evidence of the distance they are to be carried, the answer in the present case is, that there was such contrary agreement.

The objection that the bill of lading was not signed by both parties is without validity. It is enough that it was signed by the company, and accepted and acquiesced in by the other party, and that there was no fraud, deceit or mistake accompanying the transaction. There are abundant authorities to this effect.

Judgment reversed, and cause remanded.

NOTE.—See *Lawrence v. The Winona and St. Peter Railroad Company*, ante, 120; also *The Nashua Lock Company v. The Worcester, etc., R. R. Co.*, ante.—REF.

 KNOWLTON, plaintiff in error, v. THE ERIE RAILWAY COMPANY.

(19 Ohio St. 280.)

Contracts—Lex loci.

The plaintiff was injured, through negligence of defendant, while traveling on defendant's train, in the state of New York, under a contract made and to be executed therein, and valid by the laws thereof, by the terms of which the plaintiff was to be carried gratuitously, and was to assume all risks of injury arising through negligence of defendant's servants, or otherwise. *Held*, that the validity of the contract must be determined by the laws of New York, and that, it being valid in that state, the plaintiff could not recover.

APPEAL from a judgment entered on demurrer.

The plaintiff brought action to recover damages alleged to have been sustained by him while a passenger on defendant's railroad, from Dunkirk, in the state of New York, to New York city, by reason of the explosion of the boiler of the engine attached to the train.

The defendant, answering, alleged that the plaintiff was, at the time of the accident, riding on defendant's cars under a contract

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made and to be executed in the state of New York, and valid under its laws, by the terms of which the plaintiff was to be carried gratuitously, and was to assume all risks of injury, whether occurring through the negligence of defendant's servants, or otherwise.

The plaintiff demurred to the answer, and, his demurrer being overruled, judgment was entered for defendant. The plaintiff filed his petition in error to reverse this judgment.

L. H. Moses, for plaintiff in error.

Wm M. Stull, for defendant in error.

OTT, J. It has been repeatedly held by this court, that a common carrier cannot, in this state, even by express contract, relieve himself from liability for injuries caused by his own negligence, or that of his servants, in the discharge of the duties incident to his employment. But, in this case, the plaintiff by his demurrer admits that the contract for his carriage was made in New York, and was wholly to be performed in that state; that it expressly stipulated for defendant's exemption from all liability for such negligence as that which constitutes his cause of action, and that such contract exempting the carrier from liability is valid in that state. As the contract was made within the jurisdiction of New York, and contemplated no action outside of that jurisdiction, it is clear that the question of its validity must be determined solely by the laws of New York. The rights and obligations of the parties to such a contract, and in respect to the manner of its execution, cannot be affected by the laws or policy of other states. If no cause of action arose to the plaintiff under his contract, when the accident occurred, the transaction cannot be converted into a cause of action by the fact that the parties have subsequently come within the jurisdiction of Ohio. Story's Conf. of Laws, § 242; 2 Redf. on Railways, § 15. The judgment of the court below must be affirmed.

Sinks v. Reese.

SINKS, plaintiff in error, v. REESE.

(19 Ohio St. 306.)

Constitutional law—right of residents on lands ceded to United States to vote

Under and in pursuance of an act of congress, "The National Asylum for Volunteer Soldiers," was established in Ohio upon land acquired by the United States, and jurisdiction over which had been ceded by the state to the United States, and contained inmates, some of whom were, and others were not, residents of Ohio at the time of entering. At an election held in the county wherein the asylum was situated, certain of the inmates were allowed to vote. *Held*, that, as the asylum was a "needful building" within the provision allowing the United States to acquire land, and the United States had exclusive jurisdiction over it, the inmates were not residents of the state, and therefore not entitled to vote.

THE case is stated in the opinion.

D. A. Houk, Young & Gottschall, J. A. Schauck and Conover & Craighead, for plaintiff in error.

C. L. Vallandigham and H. Elliott, for defendants in error.

BRINKERHOFF, C. J. At the October election of 1869 the parties to this case were rival candidates for the office of clerk of the court of common pleas of Montgomery county. The clerk of the court of common pleas of the county, with two justices of the peace, proceeding under the statute, within the time prescribed after the election, to make an abstract of the returns of the votes cast in the several election precincts of the county, declared that John F. Sinks was duly elected to the office—he having six thousand three hundred and six votes, while David W. Reese had six thousand two hundred and eighty-three; showing a majority for Sinks of twenty-three.

Within the time prescribed by law in such cases, Reese filed in the office of said clerk notice in writing of his appeal from the finding and declaration of the clerk and justices, claiming that he had received a majority of the votes cast at said election for the office of clerk. He also in due time served upon Sinks notice in writing of his intention to contest said election, and of the time and place of taking depositions of witnesses, to be given in evidence on the trial of the contest in the court of common pleas.

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At the next term of that court following the election, the case was tried; and the court found that Reese had received a majority of the votes cast at the election for clerk — his majority, as so found by the court, being twenty-seven votes. To reverse this finding of the court of common pleas a petition in error is prosecuted in this court.

It is evident that the case was very zealously contested in the court of common pleas, eighteen bills of exception having been taken by counsel for plaintiff in error, during the progress of the trial, to the various rulings of the court.

We do not deem it worth while to notice, and much less to discuss, all the points thus made and presented by the record; but, as we are of opinion that the court below did err in some of its rulings, to the prejudice of the plaintiff in error, we will content ourselves with a notice of those rulings only.

The leading question in the case arises on this state of facts, as appears from the record. Within the boundaries of one of the election precincts of Montgomery county is situated an institution known in law and in fact as "The National Asylum for Disabled Volunteer Soldiers." At the time of the election in question there were a considerable number of disabled volunteer soldiers, late of the army of the United States, staying at, and maintained and provided for in, that institution, some of whom were, and others of whom were not, at the time of their entrance therein, resident citizens of this state. Of these persons, thirty in number, who had been inmates of the asylum for more than one year preceding the election were permitted to vote, and did vote, for Sinks. Eight other inmates of the asylum, similarly qualified or disqualified, were permitted to vote, and did vote, for Reese. It appears from a bill of exceptions, forming part of the record, that the court, in making up its finding of the number of votes cast for the parties, respectively, rejected the former, and (through inadvertence and oversight, as we have good reason to believe) allowed the latter; and this is assigned for error.

The question thus presented, as to the legality or illegality of the votes of the inmates of the asylum, leads us necessarily to inquire, What is, in law, the character of this institution? and, What is the legal status of its resident inmates?

And first, as to the character, in law, of the institution. It was established under and in conformity to the provisions of the act of the congress of the United States, of March 21, 1866, entitled "An

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act to amend an act entitled 'An act to incorporate a national military and naval asylum for the relief of the totally disabled officers and men of the volunteer forces of the United States.'"

The first three sections of the act provide for "an establishment for the care and relief of the disabled volunteers of the United States army, to be known by the name and style of 'The National Asylum for Disabled Volunteer Soldiers,'" with a board of managers, consisting of the president of the United States, secretary of war, chief justice of the United States, for the time being, together with nine others, no two of whom shall be residents of the same state, to be appointed by joint resolution of the two houses of congress, to have perpetual succession, with power to take, hold and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules and regulations for carrying on the business and government of the asylum, and affix penalties thereto. The fourth section confers power on the board of managers to procure sites, and to have necessary buildings erected thereon of sufficient capacity to accommodate the persons to be provided for. The fifth section appropriates various forfeited and unclaimed funds in the treasury of the United States to the support of the asylum, and authorizes the acceptance of donations for its benefit. The ninth section provides "that all inmates of the asylum shall be and they are hereby made subject to the rules and articles of war, and will be governed thereby, in the same manner as if they were in the army of the United States." And the thirteenth and last section provides "that congress may at any time hereafter alter, amend or repeal this act."

Here, then, is an institution invested with corporate powers, established by the government of the United States for its own purposes—the relief and support of its disabled volunteer soldiers. It is placed under the sole control and management of a board constituted, appointed, and to be appointed perpetually, by the government of the United States. It is to be maintained by funds from the treasury of the United States, and its inmates are subjected to and governed by the rules and articles of war of the United States.

That congress had the right, under the constitution of the United States, and with the consent of the legislature of this state, to establish such an institution, we think there can be no reasonable question. By the eighth section of the first article of the constitution, it is provided "that the congress shall have power * * to exer-

cise exclusive legislation in all cases whatsoever * * over all places purchased, by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and *other needful buildings*." The power to declare war and to raise and support armies is vested in the congress of the United States. These provisions anticipate the existence of a state of war. Disease and wounds, maiming and disabilities, are the natural and necessary consequences of war; and to leave men, maimed and disabled while in the service of the government, unprovided for, would shock not only the sensibilities, but the sense of justice, of all civilized men. Asylums for the disabled soldier in no substantial sense differ from hospitals in a fortress or in the field. All are alike necessary, and the power to erect and maintain them is incidental to the war power of the government.

The legislature of this state has consented to the establishment of this asylum. By the first section of the act of April 13, 1867 (64 O. L. 149), it is provided:

"SECTION 1. That jurisdiction of the lands and their appurtenances, which may be acquired by donation or purchased by the managers of the national asylum for disabled volunteer soldiers within the state of Ohio, for the uses and purposes of said asylum, be and is hereby ceded to the United States of America; provided, however, that all civil and criminal process issued under the authority of the state of Ohio, or any officer thereof, may be executed on said lands and in the buildings which may be located thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid; and provided, further, that nothing in this act shall be construed to prevent the officers, employees and inmates of said asylum, who are qualified voters of this state, from exercising the right of suffrage at all township, county and state elections, in the township in which the said national asylum shall be located."

The second section of the same act exempts all the property, real and personal, held by the board of managers for the uses and purposes of the asylum, from taxation and assessment, "so long as the same shall remain the property of the United States, for the uses of the national asylum."

This act of the state legislature, consenting to the establishment of the asylum within her borders, and ceding "jurisdiction of the lands and appurtenances" of the asylum to the United States, under the operation of the clauses of the eighth section of the first article

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of the constitution of the United States above referred to, fixes the exclusive jurisdiction of the general government over this institution, its lands and its inmates, "in all cases whatsoever," except as to the execution of process issuing under state authority.

2. This leads us to consider what is the legal status of persons who become residents upon the grounds, and within the limits, of the institution thus within the exclusive jurisdiction of the United States; and how does it affect their claim to exercise the elective franchise in Ohio, under its constitution and laws? In passing on these questions, there is little need of speculative reasoning; for they have been in effect settled by repeated decisions of courts of high and conclusive authority. By becoming a resident inmate of the asylum, a person, though up to that time he may have been a citizen and resident of Ohio, ceases to be such; he is relieved from any obligation to contribute to their revenues, and is subject to none of the burdens which she imposes upon her citizens. He becomes subject to the exclusive jurisdiction of another power, as foreign to Ohio as is the states of Indiana or Kentucky, or the District of Columbia. The constitution of Ohio requires that electors shall be residents of the state; but under the provisions of the constitution of the United States, and by the consent and act of cession of the legislature of this state, the grounds and buildings of this asylum have been detached and set off from the state of Ohio, and ceded to another government, and placed under its exclusive jurisdiction for an indefinite period. We are unanimously of the opinion that such is the law, and with it we have no quarrel; for there is something in itself unreasonable that men should be permitted to participate in the government of a community, and in the imposition of charges upon it, in whose interests they have no stake, and from whose burdens and obligations they are exempt. In 1811 the case of *Commonwealth v. Clary* was decided by the supreme court of Massachusetts. 8 Mass. 72. It was an indictment under the laws and in a court of the state for selling spirituous liquor without license, within grounds purchased by the United States within the town of Springfield with the consent of the legislature of the state, and for the purpose of an arsenal. In the legislative act of consent, a reservation as to the service of state process was made similar to that contained in the Ohio act of consent and cession heretofore referred to. It was held, "that the territory on which the offense charged is agreed to have been committed is the territory of the United States, over which the

congress have the exclusive power of legislation. The assent of the commonwealth to the purchase of this territory by the United States had this condition annexed to it: that civil and criminal process might be served therein by the officers of the commonwealth. This condition was made with a view to prevent the territory from becoming a sanctuary for debtors and criminals; and from the subsequent assent of the United States to the said condition, evidenced by then making the purchase, it results that the officers of the commonwealth, in executing such process, act under the authority of the United States. No offenses committed within that territory are committed against the laws of this commonwealth; nor can such offenses be punishable by the courts of the commonwealth, unless the congress of the United States should give to the said courts jurisdiction thereof.

"As a consequence of these positions, it is the opinion of the court that they have no cognizance of the offenses charged in this indictment, and that the defendant must be discharged.

"An objection occurred to the minds of some members of the court, that if the laws of the commonwealth have no force within this territory, the inhabitants thereof cannot exercise any civil or political privileges, under the laws of Massachusetts, within the town of Springfield. We are agreed that such consequence necessarily follows; and we think that no hardship is thereby imposed on those inhabitants; because they are not interested in any elections made within the state, nor held to pay any taxes imposed by its authority, nor bound by any of its laws. And it might be very inconvenient to the United States to have their laborers, artificers, officers, and other persons employed in their service, subjected to the services required by the commonwealth of the inhabitants of the several towns.

"It will be noticed that in this decision we make a distinction between persons who actually dwell within the territory owned by the United States, and the laborers and artificers employed therein, who have their dwelling elsewhere."

Story, in his commentaries on the Constitution, treating of this subject (§ 1227), says: "That the states cannot take cognizance of any acts done in the ceded places after the cession; and, on the other hand, the inhabitants of those places cease to be inhabitants of the state, and can no longer exercise any civil or political rights under the laws of the state." But it is needless to multiply quotations.

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Suffice it to say, that to the same general effect is the opinion of Chancellor Kent. 1 Com., marginal paging 429, 430, 431; and *United States v. Davis*, 5 Mason, 356; *Same v. Cornell*, 2 id. 60; 1 Met. 580; *Mitchell v. Tibbitts*, 17 Pick. 298.

As for the concluding proviso of the first section of the Ohio act of cession, hereinbefore quoted, and the provision substituted therefor in the first section of the act amendatory thereof (65 O. L. 208), it is unnecessary for us to consider and determine their proper construction and meaning, for the reason that it is not constitutionally competent for the general assembly to confer the elective franchise upon persons whose legal status is fixed as non-residents of the state.

We are of opinion, therefore, that the court below did not err in rejecting as illegal the votes cast by resident inmates of the national asylum for Sinks, and that it did err in refusing to reject as illegal the eight votes of Adams, Combs, Bankhead, Ott, Forde, Gray, Lewerdy and Walkins, resident inmates of said asylum, cast for Reese.

The next point on which we are of opinion that the court below erred in its ruling arises in this way: The contestor offered in evidence at the trial the depositions of himself and of sundry other witnesses, to the effect that he and they, after the election, had examined the poll-book and tally-sheet made and kept at the election in the sixth ward of the city of Dayton, and had counted the ballots cast at the election in that ward, and that they had found an error in the count and return of the votes in that ward of fifteen in favor of Sinks and against Reese. Neither poll-book, tally-sheets nor ballots were attached to or accompanied the depositions, nor was there any evidence given or offered to show any reason why these were not or could not be produced. The plaintiff in error objected to the competency of the depositions as evidence, on the ground that the evidence offered was secondary in its nature, and not the primary and best evidence of which the case admitted. The court overruled the objection, and admitted the depositions in evidence, and the plaintiff in error excepted.

We are unable to find any good reason why the general rule, that the best evidence of which the case in its nature is susceptible ought to be adduced, unless good cause is shown why it is not done, should have been departed from in this case. The depositions admitted in evidence show that the poll-book, tally-sheets and ballots of the

sixth ward were readily accessible, and might have been attached to a deposition and exhibited to the court. The official return of the votes cast in the ward was made by three judges of the election under their official oaths. Then come the depositions of the contestor himself, and three other witnesses selected by himself, testifying to a mistake of fifteen made in the count. The case illustrates the wisdom of the rule. It would have been far more satisfactory to have had the tally-sheet, poll-book and ballots themselves to speak for themselves, both as to number and contents; and the inspection of these papers by the court itself would, we think, involve no such degree of inconvenience as to justify a relaxation of the rule. The application of this rule to the sixth ward, and other election precincts in respect to which the same question was made, and the error of the court below in counting eight votes cast for Reese by inmates of the asylum, disposes of a sufficient number of votes for Reese to change the result arrived at by that court, and compels a reversal of its finding.

We are furthermore of the opinion that the court below erred in counting for the contestor the vote of one Wortz, whom the testimony clearly shows, we think, to be an idiot; and also in refusing to count the vote of an old gentleman of the name of Davidson, who is not shown by the evidence to be either a lunatic or an idiot, but simply a man whose mind is greatly enfeebled by age. This is not a legal disqualification; and the reverence which is due to "the hoary head" ought to have left his vote uncontested.

As to many other points made by the plaintiff in error, and not herein above referred to, we content ourselves with saying that we find no substantial error prejudicial to the plaintiff in error in the rulings of the court below.

Finding of the court of common pleas reversed, and case remanded for new trial.

Walker v. Stetson.

WALKER, plaintiff in error, v. STETSON.

(19 Ohio St. 400.)

Bill of exchange—presentment for acceptance, when not necessary

W. drew a bill of exchange on G., made payable to his own order on a day certain at the Ocean Bank, New York. At maturity the bill was presented at the bank for payment, and duly protested for non-payment. G. was in funds at the time, and would have paid the bill had he known of its existence, but he afterward became insolvent. In an action by the indorser against the drawer, *held*, that the holder of the bill was not bound to present it to the drawee for acceptance; that it was the duty of the drawer to have notified the drawee of the bill, and that presentment at the bank was sufficient to charge the antecedent parties.

STETSON sued Walker in the court of common pleas of Cuyahoga county, in January, 1857, on two bills of exchange, which Stetson alleged he had been compelled to pay and take up, as the accommodation indorser of Walker.

The case was taken to the district court by appeal.

The bills were both drawn at Cleveland, in this state, by Walker payable to his own order, at the Ocean Bank in the city of New York, three months after their respective dates, and were addressed "To John T. Gleason, Esqr., No. 115 Chambers street, New York."

The bills were indorsed by Walker and by Stetson, and discounted by Mygatt & Brown, as Stetson alleged, for the sole benefit of Walker.

The bills as they respectively matured were presented at the Ocean Bank and payment demanded, which was refused; but neither of them was presented to the drawee for acceptance, nor was he notified by the holders, Mygatt & Brown, or otherwise, of the existence of the bills, or of their presentment at the bank for payment. The bills were duly protested for non-payment.

On the trial in the district court, Walker, the defendant, asked the court to instruct the jury, "that, to entitle Stetson to recover, the jury must find that the bills of exchange were presented either personally, or at 115 Chambers street, to Mr. Gleason, the drawee, for acceptance; and that presentment of them at the Ocean Bank for payment on the day of their maturity, would not be, in law, a sufficient presentment for acceptance."

This instruction was refused, and in respect to it the court charged, "that a presentment for *acceptance* to the drawee personally, or at 115 Chambers street, was not necessary; but that a presentment at the bank where said bills were payable, at the proper time, *for payment*, would be a sufficient presentment of the bills."

Numerous other charges were asked, some of which, with or without qualifications, were given to the jury, and others refused; but as their materiality, as respects the case made in the record, depends upon the assumed error of the court in its charge and refusal to charge as above stated, it is not necessary to set them out.

A verdict having been rendered for the plaintiff below, the refusal of the court to grant a new trial, on the ground that the verdict is not sustained by sufficient evidence, is likewise assigned for error; and the present petition in error is filed by Walker, the defendant below, to obtain the reversal of the judgment rendered on the verdict.

Prentiss & Baldwin, for plaintiff in error.

S. O. Griswold, for defendant in error.

WHITE, J. The material question in the case is, whether, in the absence of an acceptance, the presentation of the bills at the Ocean Bank for payment was a sufficient presentment of the bills to charge the drawer and the indorser.

In our opinion it was. The theory of a bill of exchange is, that it is drawn on funds to be provided by the drawer. From this it would seem to follow, that, where the drawer in the bill appoints a time and place of payment, it is his duty to see that funds are provided at the appointed time and place to pay it. And, if this is so, the duty of the holder in respect to demanding payment would seem to be performed by a presentment in due time, at the designated place.

It is not denied that this would be true in the case of an accepted bill; but it is contended that the holder is *bound* to make presentment to the drawee for *acceptance*, and that his failure to do so discharges the antecedent parties.

We do not so understand the law. It is true that, where a bill is made payable within a specified time after sight, it is necessary, in order to fix the period when it is to be paid, to present it to the

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drawee for acceptance, otherwise the time of payment would never arrive; but when it is payable at a specified date, or at a certain period after date, no presentment for acceptance is necessary. Byles on Bills, side pp. 139, 168; Story on Bills, § 228; *Bank of Washington v. Triplett*, 1 Pet. S. C. 25; *Townsley v. Sumrall*, 2 id. 170.

And in *O'Keefe v. Dunn*, 6 Taunt. 308, DALLAS, J., in speaking of the nature of the contract arising from the drawing of a bill payable at a future specified date, says: "He [the drawer] does not stipulate for himself that it shall be presented for acceptance, nor does the law impose such an obligation on the payee. The drawer, therefore, must be considered as contented to rest in ignorance whether it has been accepted or not till the bill becomes due. And whether presented or not depends upon the casualty of how the holder of the bill may choose to proceed."

The strong probability from the evidence is, that the non-payment of the bills resulted from the fact that the drawee was not advised of the drawing of the bills. He states that he was in funds, and would have paid them had he been so advised.

The question is, whose duty was it to have given him this advice? It seems to us it was the duty of the drawer, for whom the drawee was expected to act in making the payment.

The words "No. 115 Chambers street," added to the name of the drawee, we regard as *descriptio personæ*. They imposed no additional obligation on the holder in respect to requiring presentment of the bills for acceptance, from what would have existed had the words been omitted. They were merely intended to direct the holder, if he desired to have the bills accepted, where to seek the drawee.

As to the assignment of error that the verdict is not supported by sufficient evidence, it is enough to say, we find no grounds which would justify a reversal of the judgment.

Judgment aff med.

Second National Bank v. Walbridge.

SECOND NATIONAL BANK, plaintiff in error, v. WALBRIDGE.

(19 Ohio St. 419.)

Warehouse receipt—position of assignee of.

A warehouseman, on application by the owner, issued by mistake, and at different dates, two warehouse receipts for the same goods, the first of which the owner assigned, for value, to F., and the other to the plaintiff. Afterward the warehouseman delivered the goods to the plaintiff on the second receipt. Whereupon, F. recovered the goods of plaintiff by replevin. On suit by plaintiff to recover of the warehouseman the value of the goods, *held*, that a warehouse receipt was not, technically, a negotiable instrument; that the assignee thereof occupied no better position than the assignor, and that, therefore, the plaintiff could not recover.

THE defendant was a warehouseman, and had received in store, at different times, for Lewis & Son, manufacturers of oil, fifty-seven barrels of oil, for forty-two barrels of which they had given a warehouse receipt in the usual form. This receipt was transferred by Lewis & Son to the First National Bank of Toledo. Subsequently the defendant issued to Lewis & Son a warehouse receipt for the fifty-seven barrels of oil, forty-two barrels of which were covered by the former receipt. This second receipt Lewis & Son indorsed, and assigned, in the usual course of business, to the plaintiffs, the Second National Bank, to secure prior indebtedness as well as further loans, and received on the credit thereof from plaintiff a loan of \$620.94.

At the time the second receipt was given, neither the defendant, nor Lewis & Son, nor the plaintiff, had any actual knowledge of the existence of the first receipt, that having been obtained and transferred by a former clerk of Lewis & Son without the knowledge of the firm, and was not entered in the firm books. It was issued by a clerk of defendant, who was absent from the office when the second receipt was given.

Shortly after the assignment of the second receipt to the plaintiff, the latter presented it to defendant and demanded the oil, which was at once delivered. Thereupon the First National Bank commenced suit, and, by replevin, took the forty-two barrels of oil from plaintiff's possession, and on the trial the title of that bank was sustained against the Second National Bank.

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This suit was brought to recover of the defendant the value of oil so taken. Judgment was given for defendant, to reverse which this petition in error was filed.

W. Baker, for plaintiff in error.

M. R. & R. Waite, for defendant in error.

WHITE, J. If Lewis & Son had retained the receipt, it is clear that they, upon the facts, could have maintained no action against the defendants.

In *Burton et al. v. Wilkinson et al.*, 18 Vt. 186, it was held, "if a warehouseman receive goods, and the bailor had no title to the goods, and they are taken from the custody of the warehouseman by the authority of the law, as the property of a third person, the warehouseman may show this in defense of an action brought against him by the bailor of the goods."

The only question for our determination is, whether the plaintiff, as the assignee of the receipt, occupied a better position than Lewis & Son would have occupied had they retained the receipt.

A receipt given by a warehouseman for property placed in his possession for storage is not, in a technical sense, like a bill of exchange, a negotiable instrument, but it merely stands in the place of the property it represents, and a deliverance of the receipt has the same effect in transferring the title to the property as the delivery of the property. *Burton v. Curyea*, 40 Ill. 320.

The question has frequently been brought under consideration in regard to bills of lading.

Thus in *Thompson v. Dominy*, 14 Mees. & Wels. 403, it was held that a bill of lading is not negotiable like a bill of exchange, so as to enable the indorsee to maintain an action upon it in his own name; the effect of the indorsement being only to transfer the right of property in the goods, but not the contract itself.

PARK, B., in delivering the opinion in that case, said: "I never heard it argued that a contract was transferable, except by the law merchant; and there is nothing to show that a bill of lading is transferable under any custom of merchants. It transfers no more than the property in the goods; it does not transfer the contract."

And ALDERSON, B., in his concurring opinion, added, that the word "negotiable," as applied to a bill of lading, "was not used in

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the sense in which it is used as applicable to a bill of exchange, but as passing the property in the goods only."

To the same effect is *Gurney v. Behrend*, 25 E. L. and E. 136 (S. C.), 3 Ellis & Bl. 622; *Howard v. Shepherd*, 9 Man., Grang. & S. 298 (S. C.), 67 E. C. L. 297; and *Blanchard v. Page*, 8 Gray, 296.

Nor is there any force in the claim made in argument, that the receipt in this case was negotiable because, by its terms, the property was declared to be subject to the "order" of the bailor. In this class of instruments the property is usually made deliverable to "order" or "assigns;" and such was the fact in all of the cases above cited.

This case is clearly distinguishable from the cases urged upon our attention, where negotiable paper, invalid between the original parties, has been enforced in favor of a *bona fide* holder for value; also, from the cases where the representation of the defendant has been made directly to the plaintiff, with the view of influencing his conduct.

In the former class of cases, the negotiable character of the paper affords the holder protection; in the latter class, when the other necessary elements are found, there exists good ground for the application of the doctrine of estoppel.

The issuing of the receipt in this case involved no element of bad faith, but was simply a mistake of the defendant, which he was influenced to commit by the application of Lewis, whose conduct distinctly implied that no receipt had before been given for the forty-two barrels.

In *Caldwell v. Ball*, 1 D. & E. 205, it was held, that where several bills of lading have been signed, no reference is to be had to the time when they were signed by the captain; but the person who first gets one of them by legal title from the owner or shipper has a right to the consignment. Also, that when such bills, though different upon the face of them, are constructively the same, and the captain has acted *bona fide*, a delivery according to such legal title will discharge him from them all.

The action was trover, brought by the assignee against the captain for the goods embraced in the bill of lading first issued.

It was contended for the plaintiff that the contradictory claims of the assignees of the different bills of lading resulted from the defendant's own wrong, and could not have happened without, and that he was therefore liable to the plaintiff.

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In speaking to this point, BULLER, J., said: "The defendant acted fairly, and it could only happen by the subsequent conduct of Thompson [the shipper], namely, by his afterward indorsing the bill of lading to another party, that any difficulty could arise."

And ASHURST, J., also declared, that "If it could be proved, or there was any reason to infer, that the defendant meditated a fraud on any person, that would afford an argument against him; but no fraud can be presumed here."

The plaintiff was held not entitled to recover.

The decision in *Griswold v. Haven*, 25 N. Y. 596, cited and relied upon by the plaintiff's counsel, does not sustain him. The estoppel in that case was held to arise on the false representation of Wright, one of the defendants, that the grain mentioned in the receipts was in store and in good order. This representation was made directly to and was relied upon by the plaintiff in making the advances.

That this was the ground of the estoppel enforced in that case is apparent from the comments made upon the cases of *Grant v. Norway*, 10 C. B. 665, and *Coleman v. Riches*, 29 E. L. & E. R. 323, and from page 607 of the report, where SELDEN, J., in delivering the opinion of the court, says: "I have no hesitation, therefore, in holding that, under the circumstances of this case, the defendants were bound by the representations of Wright. I mean the verbal representations; not the representations contained in the receipt."

In the present case, it is to be observed that we have, in this state, no statute affecting the rights of the parties; and, in the absence of such statute, we are of opinion that the defendant is not estopped from showing, as against the plaintiff, the mistake in the issuing of the receipt as a defense to the action.

Judgment affirmed.

HOLLINGSWORTH, plaintiff in error, v. SHAW.

(19 Ohio St. 430.)

Slander — calling one a deserter.

In an action of slander, for calling plaintiff a "deserter," without alleging special damage, *held*, that as the offense alleged was only cognizable by a court-martial, the action could not be maintained.

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THE plaintiff brought an action of slander against the defendant in the court below. The petition states that the plaintiff enlisted and served as a private soldier in the 96th regiment Ohio volunteers, from August 8, 1862, till March 7, 1865, when he was honorably discharged. That the defendant, on the 19th of March, 1866, in a discourse which he then had with and concerning the plaintiff in the hearing of divers persons, falsely and maliciously spoke and published of and concerning the plaintiff the false, scandalous and defamatory words following: "You" (meaning said plaintiff) "are a deserter;" meaning that plaintiff had deserted from the army of the United States. The petition alleges no special damages, and upon demurrer thereto, judgment was rendered for the defendant; and the only question made here is whether the words charged are actionable *per se*.

H. S. Prophet, for plaintiff in error.

Bertrand Andrews and Disney Rogers, for defendant in error.

SCOTT, J. The rule, as laid down by Starkie, is, that "no charge upon the plaintiff, however foul, will be actionable, without special damage, unless it be of an offense punishable in a temporal court of criminal jurisdiction." 1 Starkie on Slander, 21. The rule has been otherwise stated, thus: that "words, to be actionable, must either have produced a temporal loss to the plaintiff in special damage sustained, or they must convey a charge of some act criminal in itself, and indictable as such, and subjecting the party to an infamous, more especially a corporal, punishment; or some indictable offense, involving moral turpitude." 1 Hill. on Torts, 239; *Brooker v. Coffin*, 5 Johns. 188; *Young v. Miller*, 3 Hill, 21; 2 E. D. Smith, 388; *Dial v. Holter*, 6 Ohio St. 228; *Turner v. Ogden*, 2 Salk. 696; *Van Ness v. Hamilton*, 19 Johns. 367; *McCuen ads. Ludlum*, 2 Harr. (N. J.) 12; *Birch v. Benton*, 26 Mo: 153.

These authorities, and the general current of decisions, warrant us in saying, that, to render words actionable *per se*, on the ground that they impute criminality to the plaintiff, they must, first, be such as charge him with an indictable offense; and, second, the offense charged must involve a high degree of moral turpitude, or subject the offender to infamous punishment.

In the case before us, the words charged are not such as would, if true, render the plaintiff liable to indictment. The charge mad:

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is cognizable only by a court in which indictments and trial by jury are unknown, and in which punishments are graduated rather with reference to the exigencies of the service than to the intrinsic turpitude of the offense.

Counsel have referred us to no case, and we are not aware of any, in which a charge of a crime or misdemeanor of a purely military character, and cognizable only by a court-martial, has been held actionable without special damage.

We hold that the demurrer to plaintiff's petition was properly sustained by the court below, and its judgment is therefore affirmed.

Howk, plaintiff in error, v. MINNICK.

(19 Ohio St. 402.)

Action for value of stolen property against offender.

In an action to recover the value of property alleged to have been stolen from the plaintiff by the defendant, *held*, that the right of action was not suspended until the determination of a criminal prosecution against the offender

THIS was an action against the defendant, Minnick, to recover the value of certain property alleged to have been stolen by him.

The plaintiff, in his petition, filed in 1866, sets forth the following: That, on or about the 20th day of March, 1854, he was the owner of certain United States and foreign gold and silver coin, of the value and amount of eight hundred and fifty dollars; that the same was in possession of and kept by the plaintiff in his dwelling-house at Wellington, Ohio; that the defendant, Minnick, in the night season, did unlawfully, feloniously, and with force and violence, against the will of the plaintiff, and without his knowledge, break and enter into said dwelling, and did then and there fraudulently take, steal, and carry away said coin, and convert the same to his own use, and, from that date to the present, fraudulently concealed such taking and concealing of the coin from the plaintiff; and that the defendant's connection with the taking and conversion of the coin was fraudulently concealed from the plaintiff's knowledge. That, by reason of the premises, the plaintiff has been damaged in, and there

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is due to the plaintiff from the defendant, the sum of one thousand and six hundred dollars, for which judgment is asked.

The defendant demurred to this petition, first, on the ground that it did not state facts sufficient to constitute a cause of action; and, second, that it appeared upon the face of the petition that the action was barred by the statute of limitation.

The demurrer was sustained and the plaintiff filed his writ of error.

J. H. Dickson, for plaintiff in error.

N. J. Johnson, for defendant in error.

WHITE, J. Two questions arise in this case.

The first is, whether the plaintiff's right of action is merged in the crime committed in the taking and conversion of his property; or rather, according to the more modern doctrine in England, is suspended until the determination of a criminal prosecution against the offender.

A great diversity of decision is found in regard to this doctrine in the different states. In some it is recognized in a modified form, while in others its existence is denied.

In the case of the *Boston and Worcester R. R. Co. v. Dana*, 1 Gray, 83, it is held by the supreme court of Massachusetts that the doctrine of the English law, that for goods stolen no action lies against the felon before the institution of criminal proceedings against him, is not in force in that state. And in the lucid and elaborate opinion of BIGELOW, J., the weight of American authority is stated to be in accordance with the conclusion arrived at in that case.

In this state we have no common-law offenses; and, looking to the origin of the rule, and the reasons upon which it is founded, in connection with the policy of our system of criminal jurisprudence, we regard its adoption here as unnecessary for the purpose of public justice, and, in the absence of legislation to the contrary, as an unwarranted restriction upon the rights of the citizen.

(The remainder of the opinion relates exclusively to the question whether the action had been barred by the statute of limitation, and is local in character.)

Judgment affirmed.

Cox v. Cox.

COX v. COX.

(19 Ohio St. 502.)

Divorce — Alimony after foreign divorce.

A husband deserted his wife in Ohio, where both parties, up to the time of the desertion, were domiciled, and where she remained. To a petition by the wife for divorce and alimony, the husband set up a decree of divorce obtained by him in Indiana, under proceedings in compliance with the statutes of that state, but in which there was no jurisdiction of the person of the wife except by constructive service, and of which she had no actual notice. *Held*, that her domicil remained unaffected by the desertion of the husband, and that the decree was no defense to her petition for alimony.

MARY F. COX, the plaintiff below, and a resident of Ohio, filed her petition for a divorce from her husband on the ground of desertion, and praying alimony. The defendant, the present plaintiff in error, answering, set up a decree of divorce obtained in Indiana after proceedings in compliance with the statutes of that state. It appeared that the wife had never had actual notice of the proceeding in the courts of Indiana for a divorce, nor that a decree had been granted.

The prayer of the petition was granted, and a divorce ordered and alimony allowed.

From this judgment the defendant appealed.

Thomas Millikin, for plaintiff in error.

Caldwell & Caldwell, for defendant in error.

WHITE, J. (after deciding a question of practice):

The second question is, whether the Indiana decree of divorce constitutes a defense to the claim for alimony.

It is not necessary in this case to examine the decisions favoring the doctrine that a foreign decree of divorce is void where the defendant, was non-resident and there was no jurisdiction of his person except by constructive service; nor those which make the validity of such decree depend upon the place of the marriage or of the offense.

The statute and the decisions of this state are to the effect, that the place of the marriage, of the offense, and the domicil of the

defendant, are not necessary to jurisdiction. It is sufficient here that the petitioning party has been a *bona fide* resident of the state for the statutory period, and that the suit is instituted in the proper county. 1 S. & C. Stat. 513; *Cooper v. Cooper*, 7 Ohio, 594; *Mansfield v. McIntire*, 10 id. 27.

The same rule prevails in many of the other states. *Harding v. Alden*, 9 Greenl. 140; *Ditson v. Ditson*, 4 R. I. 87; *Tolen v. Tolen*, 2 Blackf. 407; *Thompson v. The State*, 28 Ala. 13; *Gleason v. Gleason*, 4 Wis. 64; 2 Bish. on M. and D., chap. xi.

The ground upon which the validity of these decrees is maintained is, that marriage, being a relation involving the social status of a party to it, the state of which the complaining party is a *bona fide* resident has the right to determine his matrimonial status; and, in view of the new relations that may be formed in consequence of the dissolution of the marriage in the state where the decree is pronounced, that public policy requires the recognition of the validity of such decrees in other states.

But the principle upon which the validity of such decrees rests does not require that they should be allowed to operate in the foreign jurisdiction beyond the dissolution of the marriage. *Harding v. Alden*, *supra*; 2 Kent's Com. s. p. 110, note a.

In speaking to this point Mr. Bishop, in his valuable work above referred to, says: "The granting of a divorce by the one state, under these circumstances, does not interfere with the rights of the other state, or its apparently divorced subject. Probably the decree is not directly binding upon the person of such subject unless he appears and answers to the suit, or, at least, has notice of it served upon the person within the jurisdiction of the court rendering it. He is not necessarily bound by any collateral clause in it, as that he pay alimony; and he only ceases to be a husband because he has ceased to have a wife." 1 Bish. on M. & D. § 156 (731), § 170 (739).

In the present case the marriage was solemnized in this state, where both the parties had their domicile, until the desertion of the husband. The wife's domicile remained unaffected by his desertion. She had no knowledge of the proceedings for divorce until after the filing of her present petition, and, if her allegations are true, the grounds upon which the husband obtained the divorce were false.

At the time of the offense this state was, and still is, the place of her domicile, and, on the facts alleged in her petition, she would be

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entitled, under our laws, to either divorce or alimony, or both, at her election.

The question, therefore, is, whether the *ex parte* decree can be made available, not merely to effect a dissolution of the marriage, but to defeat the right of the petitioner to the alimony which the statute, upon the facts as they exist in regard to the husband's desertion, intended to provide for her.

We think the decree ought not to have such effect.

In arriving at this conclusion we make no distinction between a decree rendered, under the circumstances of this case, in a foreign and one rendered in a domestic forum.

In either case, to give to a decree thus obtained the effect claimed for it, would be to allow it to work a fraud upon the pecuniary rights of the wife. Such a result, in our opinion, is rendered necessary by no principle of comity or public policy—the only grounds upon which *ex parte* decrees of divorce are authorized and supported.

It is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed. On appeal, alimony may be decreed by the district court, notwithstanding the subsisting divorce pronounced by the court of common pleas. It is true the statute speaks of the allowance as being made to the wife. But the term "wife" may be regarded as used to designate the person, and not the actual existing relation; or the petitioner may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony.

In *Mansfield v. McIntire*, *supra*, a divorced wife was regarded as the widow of her former husband after his decease, and as such widow entitled to dower.

In *Richardson v. Wilson*, 8 Yerg. 57, the legislature, at the instance of the husband, had, by special act, granted a divorce dissolving the marriage. The act contained the following provision: "That nothing in this act contained shall deprive the said Mary Ann of her right to alimony, if by law she is entitled to the same." Upon bill filed by the wife after the divorce, it was held, under the statute of Tennessee, which, as regards the point now under consideration, is substantially like our own, that she was entitled to such portion of her former husband's estate as the court, from the nature of the case, deemed proper.

A similar principle was recognized in *Crane v. Meginnis*, 1 Gill & J. 464.

In *Shotwell v. Shotwell*, 1 Sm. & M. Ch. 51, it was held that, where, upon the bill of the wife against the husband, a decree *a vinculo matrimonii* has been granted, the mere omission in that decree to provide for the alimony of the wife cannot affect the wife's right to such provision, at a subsequent time, by a separate and distinct proceeding.

In that case, the circuit court having decreed a divorce *a vinculo* at the instance of the wife, the superior court of chancery took jurisdiction of a bill by the divorced wife against the husband for alimony. It is said by the chancellor in that case, that "a decree for alimony results from the decree for a divorce, but is not identical with it, or a necessary part of it."

In the subsequent progress of the case on appeal, the prayer of the wife for alimony was denied, on the ground that, as no good reason existed for her not having asked for alimony at the time she obtained her divorce, she ought not to be allowed to assert the right in a separate forum at a subsequent period.

In the decision of the case in the court of appeals, it is said by the court: "We do not intend to intimate that there may not be cases in which an original bill, after a decree for a divorce, could be maintained for alimony, but only that the present bill shows no sufficient reason for not taking, or at least asking, such a decree from the circuit court, touching the matter now in litigation. A good reason must be alleged why the alimony was not at the proper time allowed. What will be a good reason must depend upon the facts of the case when presented."

In regard to the bearing of the opinion quoted, upon the case before us, it is sufficient to say, that no stronger reasons can arise for recognizing the right to alimony after divorce, than where, as is alleged in this case, the divorce was obtained upon false grounds, with no opportunity to the wife to assert the right.

For the ruling of the district court as to the effect, on appeal, of the findings of the court below, the judgment is reversed, and the cause remanded for a new trial.

Bradford v. Bradford.

BRADFORD V. BRADFORD.

(19 Ohio St. 548.)

Will—Condition not to contest.

A condition in a will excluding from a share in the estate any heir of testator who "goes to law to break his will" is valid, both as to real and personal property.

Upon a breach of such a condition the legacy forfeited will pass to the general residuary legatee.

MOTION for leave to file petition in error to reverse a judgment entered below.

C. L. Vallandigham, for the motion.

Young & Gottschall, opposed.

SCOTT, J. Samuel D. Bradford, as surviving executor of the last will and testament of John Bradford, deceased, filed his petition in the court below to obtain a construction of the will of his testator.

By that will, a legacy of six hundred dollars was bequeathed to William Bradford, the present plaintiff, and it also contained a provision as follows: "Now, if any of my heirs is dissatisfied and goes to law to break this will, then my will is, and I direct, that they shall have no part of my estate, and I debar them from any part of my estate whatever."

The petition in the court below alleged, and the court found, that William Bradford, after the probate of the will, had instituted proceedings to contest and set aside the same, which resulted in a judgment sustaining the validity of the will. The court thereupon held, among other things, that the clause of the will above quoted was and is a good and valid provision, and that in virtue thereof the said William Bradford, having brought suit, as aforesaid, to set aside the will, had thereby forfeited all right to any share of the estate, and to the legacy of six hundred dollars; and a decree was entered accordingly.

The plaintiff here claims, among other things, that this portion of the decree was erroneous; that the clause of forfeiture, in the event of an attempt to set aside the will, must be regarded as *in terrorem* only, and therefore void in law. In the case of a condition

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subsequent such as this, and where the subject of disposition is personal estate, the doctrine of the English courts is, that the condition is to be regarded as *in terrorem* only, and that a legacy will not be forfeited by a contest of the will instituted by the legatee, unless by the terms of the will the legacy be given over to another, or be specially directed to fall into the residue, upon breach of the condition. But this doctrine has never been applied to devises of real estate. The distinction seems to have arisen from the fact that in England the ecclesiastical courts early adopted the rule of the civil law upon legatory questions, and this regarded such condition as *in terrorem* only. Courts of equity seem to have followed the rule of the ecclesiastical courts in respect to legacies, and that of the common law as to land. 1 Jar. on Wills, 850; 2 Will. on Exec. 1094 (star paging); 2 Eq. L. C. 340, *et seq.* That such a condition is valid, in a will of real estate, seems to be settled in England. *Cooke v. Turner*, 15 M. and W. 727. It would be difficult to assign a satisfactory reason, grounded upon principle, for holding otherwise in regard to personalty. In regard to both, it is the duty of the courts to carry out the intention of the testator, unless that intention be contrary to the policy of the law. No considerations of public policy require that an heir should contest the doubtful questions of fact or of law upon which the validity of a devise or a bequest may depend. The determination of such questions ordinarily affects only the interests of the parties to the controversy. As was said by the court in the case of *Cooke v. Turner*, *supra*: "There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or devisee."

We find no American decisions bearing directly upon the question; but we see no reason to doubt the soundness of the ground assumed by Judge Redfield in his work on the law of wills, where he says, (page 679): "The rule of the English law, as to conditions against disputing the will, annexed to some bequests, seems to be in a most absurd state of confusion. It is held, such a condition is void as to personalty, unless the legacy be given over, in the event of failure to perform the condition; but that such a condition is entirely valid as to real estate, whether there be any gift over or not. And it is agreed that there is no substantial ground for any distinction in this respect between real and personal estate. Hence we assume that in this country, any such condition, which is reason-

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able,—as one against disputing one's will surely is, as nothing can be more in conformity to good policy than to prevent litigation,—will be held binding and valid."

We think, then, that the court below did not err in holding this condition to be valid, and that upon its breach the plaintiff's legacy would pass to the general residuary legatees named in the will, without express words to that effect.

From certain findings of fact made by the court below, it appears that, at the time when the plaintiff instituted proceedings to contest the will under which he now claims, the will had been admitted to probate by order of the court of common pleas, upon appeal from the probate court, but had not been fully and correctly recorded by the probate judge—that he had left blanks in the record of the will, where pen erasures and interlineations appeared in the original will as probated, which he subsequently filled up, so as to correspond with the original. And the plaintiff here claims that he contested the validity of the will as it appeared of record, which was different from the real will, as proved and ordered to be recorded. The court below, however, has found that the will was admitted to probate, and that the plaintiff afterward contested it. And we cannot say that the court erred in so finding. If the will was imperfectly recorded, it does not follow that the subsequent contest referred to the will as recorded. The issue of *devisavit vel non*, provided for by statute, is made upon the original writing purporting to be the will, and not upon the record of it. This issue may be made and tried at any time after the will has been admitted to probate, and before any actual record of it has been made. Such an issue draws in question, not the accuracy of the recorded copy, but the valid execution of the original.

There are other questions which the plaintiff in error seeks to raise, but in which he has no interest, if he is excluded by his contest of the will from the rights of a legatee. Of the rulings of the court upon other questions, those only whose rights were thereby affected can have a right to complain.

Motion overruled.

 Clay v. Edgerton.

CLAY, plaintiff in error, v. EDGERTON.

(19 Ohio St. 549.)

Promissory note — guaranty of payment.

The owner and holder of a promissory note transferred it to the plaintiff, and, at the same time, indorsed thereon the following: "I guarantee the payment of the within note to C. Edgerton or order.—Isaac Clay." In an action on the guaranty, *held*, first, that no consideration for the guaranty need be alleged; second, that, as the guaranty was absolute, no averment of demand and notice was necessary.

THIS is a petition in error, prosecuted in this court to reverse a judgment of the district court of Wood county, affirming a judgment of the common pleas of that county in favor of the defendant in error and against the plaintiffs in error.

The plaintiff in the original case, Edgerton, attempted to bring his action against both Clay and Hoot, and the following is a copy of the statements of his petition:

"The plaintiff says that this his action is founded on a promissory note, of which the following is a copy:

MONTGOMERY, February 28, 1860.

Four years after date, I promise to pay Thomas S. Carman, or bearer, the sum of one hundred dollars, for value received, with use.

(Name in German)

JOHN HOOT.

"On the back of said note are the following indorsements:

Without recourse.

D. L. JUNE.

I guarantee the payment of the within note to C. Edgerton or order.

March 26, 1863.

ISAAC CLAY.

"The defendant John Hoot is liable on said note as maker, and the defendant Isaac Clay as indorser and guarantor. The plaintiff, Chester Edgerton, is the holder and owner of said note. There is due from the defendants to the plaintiff on said promissory note the sum of one hundred dollars, which he claims, with interest from the 28th day of February, 1860, and for which he asks judgment."

The defendant Clay was duly served with process, but it does not appear that Hoot was ever served with process, either actually or constructively, or that he, at any time, appeared in the case while in the court of common pleas.

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Clay appeared, and demurred to the petition, on the ground that it did not state facts sufficient to constitute a cause of action against him. The demurrer was overruled, and, in the petition in error in the district court, that ruling was assigned for error.

Thereupon Clay answered in these words: "And now comes the said defendant, and, admitting the execution of said note as set up in said petition, says that said note was assigned to him by T. S. Carman, and by him assigned, long after its delivery and the assignment thereof to him by said Carman, and before the same became due, to plaintiff. Affiant says the plaintiff gave him seventy-five cents on a dollar for said note, and no more. That, in consideration thereof, he assigned and conveyed the same to the plaintiff. And defendant says that plaintiff never has assigned said note to Hoot, the maker thereof, nor demanded payment of said Hoot thereof, nor has he presented said note to this defendant, or demanded payment thereof, nor notified this defendant that said note was unpaid; and defendant says that for a long time after said note fell due, to wit, for nearly six months thereafter, said Hoot resided in Wood county, and was perfectly responsible, and said note could have been, with reasonable care or diligence, collected of said Hoot, wherefore this defendant prays that he may be hence dismissed," etc.

To this answer Edgerton demurred, on the ground that it did not state facts sufficient to constitute a defense. The court sustained this demurrer; and the case being submitted to the court, a judgment was thereupon rendered against *both Clay and Hoot* for the amount named in the note, and interest. The ruling of the court of common pleas, sustaining the demurrer to the answer of Clay, was also assigned for error in the district court. And it is assigned for error in this court that the said district court erred in affirming the judgment of the court of common pleas.

Henry H. Dodge and J. R. Tyler, for plaintiff in error.

J. F. & S. B. Price, for defendant in error.

BRINKERHOFF, C. J. (after stating the facts). The case presents three principles: 1. Did the court of common pleas err in overruling the demurrer of Clay to Edgerton's petition? 2. Did that court err in sustaining the demurrer to Clay's answer? And, 3. Did that court err in giving a joint judgment against both Clay and Hoot for the amount of the note and interest? These in their order.

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And first as to the sufficiency of the petition.

It is claimed in argument in behalf of the plaintiffs in error, that the petition is defective, for the alleged reason that no good or valid consideration for Clay's guaranty of payment of the note is alleged in the petition. We think otherwise. No motion was made in the case to compel the plaintiff to make his petition more definite and certain in its averments, and under the provisions of the code of civil procedure it is to be liberally construed for purposes of justice. As applied to a negotiable note, the words "indorsement and indorser" imply a transfer of the title to the instrument indorsed, and the acceptance of such transfer is itself a sufficient consideration for the guaranty accompanying the indorsement. Clay is not only alleged to be a guarantor of the payment of the note, but also to be liable to the plaintiff as an indorser thereof. And this imports a consideration, as is ruled in *How & Co. v. Kemball et al.*, 2 McLean, 103; and in *Heaton v. Hulbert*, 3 Scam. (Ill.) 489. True, had Edgerton relied solely on the fact of Clay's indorsement of the note as a ground of recovery, he might have failed in his action — failed for want of due demand and notice, perhaps, but not for want of indorsement.

In the second place, it is argued by counsel for plaintiffs in error that the petition is insufficient, because it contains no allegations of demand by Edgerton upon Hoot, the maker of the note, for payment thereof, and notice to Clay of non-payment.

On this point much confusion has doubtless arisen from a failure to discriminate between a guaranty which depends on some contingency or condition, and one which is in its terms absolute and unconditional. Where a guaranty is dependent on some condition or contingency expressed in or fairly implied from the terms of the contract of guaranty, a compliance with those terms on the part of the guarantee is necessary, and must be alleged and proved in order to a recovery upon it. But where the guaranty of payment is absolute and unconditional, we are of opinion that it is not necessary, in order to make out a *prima facie* case for recovery, to aver or prove either demand or notice. This, we think, is fairly inferable from what is said by this court in *Bashford v. Shaw*, 4 Ohio St. 266. And this view of the question is directly ruled in *Allen v. Rightmere*, 20 J. R. 365; *Brown v. Curtiss*, 2 Coms. 225; *Breed v. Hillhouse*, 7 Conn. 523; *Read v. Cutts*, 7 Greenl. 136; and *Heaton v. Hulbert*, 3 Scam. (Ill.) 489. We are aware that cases may

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be found in which the point has been ruled otherwise; but it seems to us that the reasoning of BRONSON, J., in *Brown v. Curtiss, supra*, is unanswerable and irresistible. And there is nothing either in *Bashford v. Shaw, supra*, or in *Forest v. Stewart*, 14 Ohio St. 246, adverse to this conclusion; and what is said by the court in *Greene v. Dodge & Cogswell*, 2 Ohio, 431, related to a case in which the court construed the contract of guaranty sued on to be a conditional one. Now, the contract of guaranty in the case before us is absolute and unconditional. Its language is: "I guarantee the payment of the within note to C. Edgerton or order;" and we are of opinion that no averment of demand or notice in the petition was necessary; and if any loss had resulted to the guarantor by reason of any *laches* on the part of the guarantee, such *laches*, if it could be made available at all, would be matter of defense to be set up by the guarantor. For these reasons we are of opinion that there was no error in the overruling of the demurrer to the petition.

The next question is, Did the court of common pleas err in sustaining the demurrer to the answer? The substance of the answer, or rather the substance of what the pleader seems to wish to be understood as averring, is, that, for nearly six months after the note became due, the maker, Hoot, continued to reside in Wood county, and was during all that time in solvent circumstances, and that, had the note been sued on during that time, it might have been collected from him. Whether, if this averment was true, and it was also true that at the time suit was brought upon the guaranty Hoot had left Wood county and had become utterly insolvent, the guarantor would have been discharged from the obligations of his contract of guaranty, is a question which we are not called on to decide. because, for aught that appears in the answer, Hoot may still be, and may all along have been, a resident of Wood county, and the owner of property subject to execution ample to satisfy any judgment on this note.

The court of common pleas did, however, fall into one error, and one which is doubtless due to the carelessness of the attorneys in not looking after their journal entries. The court gave judgment against Hoot as well as Clay, although the former had never come nor been brought into court, and as to him the court acted without jurisdiction. The judgment against him as it stands is void; but he is entitled to rid himself of the cloud of a void judgment. The joint judgment of the court of common pleas against Hoot and Clay:

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and the judgment of affirmance by the district court, will, therefore, be reversed; and proceeding to render such judgment as those courts ought to have rendered, there will be entered a judgment against Clay alone for the amount of the note, with interest up to this time, with costs accruing in the common pleas. The costs in error will be adjudged against Edgerton, the defendant in error.

SCOTT, WELCH, WHITE and DAY, JJ., concurred.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

IN THE MATTER OF MARTIN CONNER.

(89 Cal. 98.)

Naturalization — Common-law jurisdiction.

A court having original jurisdiction of some actions cognizable by the courts of law under what is known as the "common law of England," has "common-law jurisdiction," within the meaning of the third section of the act of congress of April 14, 1802, relative to the naturalization of foreigners.

UPON *certiorari* to the county court. The case is stated in the opinion.

C. P. Sprague, for relator.

Jo Hamilton, Attorney-General, *contra*.

CROCKETT, J. The only question for decision in this case is, whether or not, under the naturalization laws of the United States and the laws and constitution of this state, the county courts of this state have power to issue papers of naturalization. The third section of the act of congress of April 14, 1802, confers power upon "every court of record in any individual state having *common-law jurisdiction*, and a seal and clerk or prothonotary." No one will deny that our county courts are courts of record, having seals and clerks. The only remaining question, therefore, is, whether they

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have "common-law jurisdiction" in the sense in which that term is employed in the act of congress.

The power to issue naturalization papers is expressly conferred upon the county courts by section 8, article 6, of the constitution, as amended in 1862; and the next succeeding section confers upon them "original jurisdiction of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, and of all such special cases and proceedings as are not otherwise provided for; and also such criminal jurisdiction as the legislature may prescribe; they shall also have appellate jurisdiction in all cases arising in courts held by justices of the peace and recorders."

Section 366 of the practice act provides that, on an appeal to the county court, unless the appeal be on questions of law alone, "the action shall be tried anew in the county court, and either party may, on such trial, demand a jury."

Aside from the express power conferred by the constitution on the county courts to issue papers of naturalization, it is not difficult to demonstrate that they have "common-law jurisdiction," within the true intent of the act of congress. The term "common-law jurisdiction" is capable of no other meaning than jurisdiction to try and decide causes which were cognizable by the courts of law, under what is known as the common law of England. Our judicial system having been modeled chiefly after that of England, we have adopted the nomenclature which prevailed in her courts. Hence, when we speak through our statutes and courts of common-law actions, proceedings at common law and common-law jurisdiction, we mean such actions, proceedings and jurisdiction as appertained to the common law of England, as administered through her courts. Among these were actions to prevent or abate a nuisance. All the authorities agree that to maintain a nuisance was an offense at common law, which might be abated by proceedings in the courts which administered that system of jurisprudence in England. 7 Bacon's Abt. 223, title Nuisances.

In this state, justices of the peace have jurisdiction of actions arising on contract, actions for damages for injury to the person, or for the taking or detention of personal property, actions for the foreclosure of mortgages on personal property, actions to recover personal property, and other similar actions, when the amount in controversy is less than three hundred dollars. Their jurisdiction

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extends to almost every class of common-law actions, when the amount in contest does not exceed that sum. In all these, appeals may be taken to the county court, on questions of law or fact, or on both, and in the two latter cases the trial is to be *de novo*, and before a jury, if either party demands it. In all this large class of cases the county court exercises "common-law jurisdiction," as effectually for the purposes of the trial, as if the action had been originally brought in that court. It has not "common-law jurisdiction" in all cases; that is to say, it has not jurisdiction over all classes of common-law actions or proceedings; nor have the district courts. The jurisdiction, on the contrary, has been apportioned between the district and county courts. But the act of congress does not require that the courts shall have *all* the common-law jurisdiction which pertains to *all* classes of actions. It is enough that it has "common-law jurisdiction." The intention of congress was to promote the convenience of aliens desiring to be naturalized, by enabling them to obtain their papers from the courts in their immediate vicinity. The act was passed prior to the acquisition of Louisiana, and at a time when every state in the Union had adopted a system of jurisprudence founded on the common law of England. When it speaks of courts having "common-law jurisdiction," it refers to such courts as had been or might be established in the several states to administer justice under that system of jurisprudence, as contradistinguished from merely local, municipal or police courts, intended for purely local government. To prevent abuses, and in order to preserve an enduring memorial of its action in granting papers of naturalization, it requires it shall be a court of record, having a seal and a clerk or prothonotary. We think our county courts, as at present organized, fulfill all the requirements of the act, and are therefore authorized to grant such papers. In *Ex parte Knowles*, 5 Cal. 303, the court intimates the opinion that none but the district courts in this state have the power to issue such papers. But the only question before the court in that case related to the power of the supreme court to issue such papers; and what is there said as to the power of other courts in that behalf is at most but *obiter dictum*.

But in that case it is decided that the "uniform rule" to which the constitution refers, and which congress is authorized to establish, is a uniform rule to be adopted and carried into effect by the several states, and that when a state designates by law one of its courts of

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common-law jurisdiction, having a clerk and seal, as authorized to grant papers of naturalization, it has thereby assented to the plan proposed by congress; and the court or courts thus designated have the requisite authority. The court found that this state had thus assented to the proposed plan by an act quoted in the opinion of the court. That act yet remains in force; and conceding to that decision its full weight on the general questions discussed, we are, nevertheless, of opinion, that our county courts, as now organized, have the requisite authority. The counsel intimates a doubt whether that clause of the constitutional amendment of 1862, which expressly confers upon the county courts the power to issue papers of naturalization, was ever properly incorporated into the instrument. But, in our view of the case, it is useless to enter upon that inquiry, inasmuch as without that clause we hold that the county courts have the requisite authority.

Judgment of the county court affirmed.

COWELL v. LUMLEY, appellant.

(30 Cal. 151.)

Lessor and Lessee — Covenant to build.

A covenant by a lessor to erect a building on the leased premises does not by implication impose upon him an obligation to rebuild in case of the destruction of the building by fire during the term of the lease; nor does the destruction of the building and the refusal of the lessor to rebuild relieve the lessee from his agreement to pay rent.

THIS was an action for rent.

Earl Bartlett, for appellant.

J. H. Appelgate, for respondent.

WALLACE, J. On the 1st day of April, 1863, the respondent leased to the appellant a water lot in San Francisco, capped and piled, but not then otherwise improved. The indenture of lease, interchangeably executed, contains the usual clauses fixing the duration of the term (which was five years from its commencement),

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reserving a monthly rent (which the appellant expressly covenanted to pay at stated periods of time), and is otherwise in the customary form, except that it contains a special covenant in the following words: "And the said party of the first part doth hereby covenant and agree to, and with the party of the second part, that he will well and truly erect or cause to be erected upon said premises, within two months from the date of this lease, a building according to certain plans and specifications this day agreed to and signed by said parties. And the said party of the second part doth hereby covenant and agree for himself, his executors, administrators and assigns, that he and they shall and will well and truly keep the said building, so to be erected as aforesaid, in good repair during said term hereby granted.

The appellant entered under the lease, and the respondent erected the building in accordance with the covenant. The stipulated rent was paid up to June, 1866, but the building having been about that time destroyed by fire, the appellant refused to pay any further rent, unless the respondent would rebuild, which the latter, upon his part, refused to do.

It is unnecessary to consider whether this refusal should have been pleaded by the appellant, in bar, or by way of counterclaim; for, in either form, it could not have availed him.

There is no express covenant, on the part of the respondent, to rebuild; he was bound to build but once, and then only to build a structure of a specified character, and within a limited time. The erection of that building within the prescribed periods forever satisfied the covenant on his part. To ascertain that he did not *expressly covenant to rebuild* is, virtually, to decide the case, for the law does not *imply* such a covenant on his part, nor will his failure to rebuild, after the accidental destruction of the premises by fire, relieve the lessee from his *express agreement* to pay the rent.

The authorities which support this proposition are too numerous to permit here a citation of them all. Some of them are: *Beach v. Furish*, 4 Cal. 339; *Sheets v. Selden*, 7 Wall. 423; *White v. Molyneux*, 2 Kelley, 126; *Linn v. Ross*, 10 Ohio, 412; *Izon v. Gorton*, 7 Scott, 546.

The order denying a new trial was therefore correct, and it is affirmed.

It is conceded, however, that the judgment is for too much money, but the counsel here differ as to the amount of the excess, and we have no means of satisfactorily ascertaining it.

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The judgment is therefore reversed, and the cause remanded, with directions to the court below to render judgment in favor of the respondent here for such sum of money for rent, interest and costs, as may be proper, not including, of course, the costs of the appeal, which must be paid by the respondent.

HARPENDING, petitioner, v. HAIGHT.

(89 Cal. 180.)

Constitutional law—return of bills to legislature by governor—mandamus to governor.

Under a section of the constitution requiring all bills passed by the legislature to be presented to the governor for his approval, to be returned with his objections in case of non-approval; and providing, "that if any bill shall not be returned by the governor within ten days after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return," the governor sent to the legislature a bill not approved, with his objections, on the tenth day, and before the usual hour for adjournment. The legislature had, however, adjourned to the day following, and the messenger returned the bill to the governor, who retained it thereafter. *Held*, 1. That the governor had not returned the bill within the meaning of the constitution. 2. That the legislature had not, by adjournment, prevented such return, the adjournment not being final. 3. That the court had jurisdiction to compel the governor, by mandamus, to cause the bill to be authenticated as a statute. **TEMPLE, J.**, dissenting.

THE petitioner moves for a peremptory writ of mandamus to be directed to the respondent, commanding him, as governor of the state, to cause to be authenticated as a statute a certain bill now in his possession, known as senate bill No. 258, which passed both houses at the late session of the legislature.

The case came before the court upon a voluntary submission made by the parties, upon the following agreed statement of facts:

Now comes the petitioner and respondent, and, without action, agree upon the following facts, and submit the same to this court for adjudication:

I. That petitioner has such an interest in the event of this proceeding as makes him a proper party thereto.

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II. That the respondent now is, and since the first Monday in December, 1867, has been, governor of the state of California.

III. That the eighteenth session of the legislature of this state commenced on the first Monday in December, 1869, and ended on the 4th day of April, 1870; that there was no adjournment of the same after the 10th of March, 1870, and before said 4th day of April.

IV. That on the 12th day of March, 1870, senate bill No. 258, entitled "An act to make, open and establish a public street in the city and county of San Francisco, to be called Montgomery street south, and to take private lands therefor," passed the senate of the state of California, and, on the 17th day of March, 1870, passed the assembly of said state, with amendments, which were concurred in by said senate on the same day.

V. That on the 19th day of March, 1870, at 1 o'clock P. M. of that day, said bill was, by the enrolling committee of the senate, delivered to the respondent for his consideration, as governor.

VI. That at the time said bill was delivered to the governor it was properly enrolled and authenticated, as prescribed by law.

VII. That on the 31st day of March, 1870, at 4 o'clock P. M., the senate of said state adjourned, to meet at 11 A. M. next day.

VIII. That on the 31st day of March, 1870, at 4:30 P. M., the private secretary of the governor entered the senate chamber with said bill, and, with a message in writing from the governor, returned said bill to the senate, without his approval; that, finding the senate had adjourned, said secretary returned said message and bill to the governor, with whom they have ever since remained.

IX. That said message had been signed by the governor before 4 P. M. on said day.

X. That on the 1st day of April, 1870, the governor transmitted to said senate the following message:

SPECIAL MESSAGE FROM THE GOVERNOR.

The following special message from the governor was read:

STATE OF CALIFORNIA, EXECUTIVE DEPARTMENT, }
SACRAMENTO, April 1, 1870. }

To the senate of the state of California: I deem it my duty to communicate to your honorable body the reason why messages returning two bills, whose titles are hereinafter given, failed of being yesterday delivered to the senate. The bills referred to are substitutes for senate bill No. 293—"An act authorizing the parties therein named, their associates and assigns, to construct and

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maintain a ship canal, from the city of Stockton to deep water on the San Joaquin river;" and senate bill No. 258—"An act to make, open and establish a public street in the city and county of San Francisco, to be called Montgomery street south, and to take private lands therefor." Messages, stating the reasons for withholding approval of these bills, were prepared and signed before the adjournment of the senate, and were transmitted through the usual channel to the senate chamber before the customary hour of adjournment. The senate having, by an adjournment until the next day, prevented the delivery of the messages and the return of the bills, they have failed to become laws, and will not, therefore, be deposited in the secretary of state's office to be certified, as required in the case of bills which become laws by lapse of time, without return to the house in which they originated. I have thought it proper to communicate the facts in the case to your honorable body, and to ask respectfully that the messages be spread upon the journals of the senate.

H. H. HAIGHT, *Governor*.

XI. That petitioner has demanded of respondent that he authenticate said bill in manner and form as provided by law in cases where bills become laws by *not* being returned to the house in which they originated, within the time prescribed by law, and that the governor has refused, and still refuses, so to do, but still retains said bill without authentication.

XII. That the standing rule of the senate, on said thirty-first day of March, required the senate to assemble in the evening for business, unless otherwise ordered; that such evening session was usual and customary at the time, it being but four days before the final adjournment; that upon said day the senate adjourned at said hour of 4 P. M. until the next morning, and that the motive of the mover of said adjournment was to prevent the return of said senate bill No. 293, and that said motion was made at the instance of petitioner.

The facts agreed and stated in subdivisions 8, 9, 10 and 12 are agreed to, subject to the ruling of this court as to whether evidence to prove such facts would be admissible on the trial of any action involving the question whether said bill had become a law.

Upon this statement it is agreed, that, if the court are of the opinion that said bill did become a law, a peremptory mandate may issue commanding the respondent to cause said bill to be authenticated as provided for by section 2 of an act entitled "An act for the authentication of statutes without the approval of the governor," approved May 1, 1852.

H. H. HAIGHT, *Respondent*.

HAMMOND, *for Petitioner*.

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Creed Hammond, being sworn, deposes and says, that he is of counsel for petitioner in this proceeding, and that the controversy is real, and that this proceeding is in good faith, to determine the rights of the parties.

CREED HAMMOND.

Subscribed and sworn to before me this sixth day of April, 1870
GEO. SECKEL, *Clerk Supreme Court*

S. Hydenfeldt, W. P. Daingerfield, Hammond & Stratton, for petitioner.

Jo Hamilton, Attorney-General, for respondent.

WALLACE, J. It will be seen that the solution of the questions presented requires at our hands, in some degree, an examination into the respective rights and duties of the executive and legislative departments of the government, in the exercise by the latter of the law-making power of the state.

It is of the deepest public concern, and of moment far beyond the mere decision of the particular case at bar, that the rights of each should be absolutely preserved from the possible assault of the other, and that neither, under cover of the performance of its own functions, should be permitted to deprive the other of its just measure of authority, as conferred upon it by the constitution.

The clauses of that instrument—through which, as we think, a decision of this controversy is to be reached—are contained in article 4 of the constitution, and are in the following language:

SECTION 1. The legislative power of this state shall be vested in a senate and assembly, which shall be designated as the legislature of the state of California. * * * * *

SEC. 17. Every bill which may have passed the legislature shall, before it becomes a law, be presented to the governor. If he approve it he shall sign it; but if not he shall return it, with his objections, to the house in which it originated, which shall enter the same upon the journal and proceed to reconsider it. If, after such reconsideration, it again pass both houses by yeas and nays, by a majority of two-thirds of the members of each house present, it shall become a law, notwithstanding the governor's objections. If any bill shall not be returned within ten days after it shall have been presented to him (Sundays excepted), the same shall be a law, in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return.

The bill in question was presented to the governor, on Saturday, March 19th; and if he intended to return it with his objections, he

was, by the general language of the constitution, bound to do so within a prescribed time after its presentation to him.

We shall proceed, therefore, to inquire whether or not the governor did make the required return of the bill to the senate, in which it had originated. There can be no doubt whatever of the meaning of the word "return," as used in this connection in the constitution. As applicable to the bill itself, it is equivalent to the word "presented," as previously used in the same sentence. The bill must before it becomes a law, be "presented to the governor." It might be merely exhibited to that officer; and even if it should be immediately thereafter taken away or withdrawn, it might be contended that it had, nevertheless, been "presented" within the very letter of the constitution. But, when we come to reflect that the only purpose for which the bill is to be "presented to the governor" is to afford him an opportunity to deliberately consider its provisions and prepare his objections, if any he have, to its passage, we would instinctively reject such a presentation as being fictitious — merely spurious — and certainly not that one contemplated by the constitution, because it would defeat, rather than promote, the very object intended.

And so, upon the other hand, when we come to consider the corresponding duty of the executive to "return" the bill to the senate in this case, we know, by attending to the results to be brought about by such "return," that it must be a step taken by which his own time for deliberation is ended, and that for the deliberation of the senate is begun; that the bill itself must be put beyond the executive possession; that it must be placed into the possession, actual or potential, of the senate itself; and that, as part of this return, the executive objections to the passage of the bill must be stated. For, unless these things be effected by the return, how can the senate enter the bill and executive objections upon its journal, or in what way proceed to the consideration of the objections themselves? Yet, the constitution enjoins upon the senate the performance of these several acts upon the return of the bill and objections to it. We think it clear that the presentation of a bill to the governor, made by the legislature, under such circumstances as that he is prevented from considering its provisions, and a return of a bill, made to the house in which it originated, by the executive, but so made that the house can neither reconsider the bill nor examine the

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objections to its passage, do not in either case constitute the presentation or return required by the constitution.

And it is apparent to us that in the case at bar no return was ever so made as that either the bill or objections came to the possession or knowledge of the senate.

The facts upon this point are few. The senate had been in session on the 31st of March, and at four o'clock P. M. had adjourned until the following morning at eleven o'clock. Within a half an hour after the adjournment for the day the messenger of the executive entered the vacant senate chamber. The object of his appearance there was to impart to the senate the knowledge of the fact that the governor had vetoed the bill in question. He had with him the usual and appropriate evidence of the fact, for he bore in his hands the bill itself to be returned, as well as the message of the governor addressed to the senate, informing that body, in the usual phrase, that the bill was therewith returned without the executive approval, and setting forth the reasons of his action in that respect. But the messenger did not deliver to the senate, nor deposit for its use with any officer of the senate, or with any other person, either the bill or message, but immediately returned them both to the governor himself, by whom they have ever since been retained. As a matter of fact, then, the senate, upon the withdrawal of the messenger from its chamber, was left in the same profound ignorance of the executive action in the premises as it had been at the moment of his appearance there. There was, therefore, no opportunity afforded for the taking of those steps by the senate which the constitution enjoins upon it in case of an executive return of a bill. And this circumstance is, as we have said, conclusive, in our opinion, that such a return cannot be considered to have been that one which is required by the constitution to be made. It sets that instrument at substantial defiance in the very act of pretended obedience to its mandates. And if such practice be inaugurated, might not the legislature easily retaliate upon the executive department? Would it be a difficult matter for it to send a messenger or member of the enrolling committee of one of the houses to the executive chamber with a bill for the executive consideration, who might not be able to find the governor at the moment that he sought him? Would it not be easy to suggest, in connection with the fact of his absence, that he was purposely avoiding the messenger—that such was his motive in absenting himself? And, then, if the legislature should

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claim that they had been thus prevented from actually presenting the bill to the governor, and that it had, therefore, become a law, would there not be found in the constitution just as much to warrant such a claim as is to be found there in support of the constructive return made by the governor to the senate in this case?

It is not difficult to foresee the result to which such a doctrine would lead in times of high party strife, or when a decided and irreconcilable difference of opinion between the executive and the legislature upon important measures had been developed. Indeed, if these proceedings had, on the part of the governor and his messenger, amounted to a veto of the bill at all, it was of necessity, under the circumstances, an *absolute* veto, for it was one from the consequences of which the senate had no means at its command to relieve the bill. Even though every senator might, in fact, have been in favor of the passage of the bill over the executive veto, there was no power, because there was no *opportunity*, to do so. It is scarcely necessary to remark that an absolute executive veto, based upon the return of a bill, is unknown to any constitutional system of government, state or federal, under which we live, and that such a veto can, under no circumstances, be upheld, without doing violence to both the letter and spirit of the constitution.

But the agreed statement informs us that the motive of the mover of the resolution to adjourn the senate was thereby to prevent the executive from returning the bill.

We mention this portion of the agreed case in order that it may not be supposed to have escaped our attention. It is proper, too, to add, that while this statement is contained in the record as a fact for our consideration in a mere legal point of view, it was admitted, in the oral argument had before us, that it has since been discovered that it is wholly untrue in point of fact, and that no such motive did actuate the mover of the resolution to adjourn. We state this as a matter of justice to the senator who made the motion in the senate to adjourn on the afternoon of March 31, upon whose public character the fact thus stated might, if not corrected in this manner, operate as a most unjust aspersion.

This fact was stipulated, however, not absolutely, but subject to the opinion of the court, as to whether evidence to prove such fact would be admissible on the trial of any action involving the question whether this bill had become a law.

Certainly no such evidence could be admitted on such a trial. It

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will be observed that the question does not extend to the motives of the majority of the senate, by whose votes the motion to adjourn was adopted. There is no pretense that the motives of that majority were not free from the designs imputed to the senator who introduced the resolution. And it would be unheard of that the action of that majority should be called in question because of the mere personal motive of the particular senator who moved the resolution. But, even had the stipulation involved the motives of the entire senate in passing the resolution to adjourn on the occasion referred to, no inquiry on that subject could be permitted in the trial of an action of this character. It has been so settled in this state by the cases of *Fowler v. Peirce*, 2 Cal. 168; *People v. Bigler*, 5 id. 23; *Sherman v. Story*, 30 id. 266, and by numerous foreign adjudicated cases and the opinions of text writers. We know of no authority which holds a contrary doctrine.

But, supposing that the law allowed proof to be introduced upon that point, and it should be conclusively established that the motive which actuated the entire senate in adjourning to the next day, upon the occasion referred to, was to prevent the executive from returning the bill on the 31st day of March, supposed to be the last of the ten days allowed him for such return, such proceeding, however in itself disgraceful and unworthy of the senate, would not even tend to the supposed result. We think that there can be no doubt that when the executive messenger arrived at the senate chamber, and found that the senate had adjourned for the day, he might have delivered the bill and message into the hands of the lieutenant-governor, president of the senate, the secretary or other officer of the senate, or to one of the senators, or to any proper person connected with, or engaged in the service of, the senate, to be called to its attention as soon as an opportunity might thereafter offer; and that such a delivery would have been as sufficient in law as though it had been delivered to the presiding officer or secretary of the senate in open session.

It was the duty of the messenger to communicate to the senate the message which he bore from the executive on that occasion. This was to be done in the most direct manner that circumstances would permit. It was impossible for him to immediately announce it to the senate, for that body was not in session. It had a right to be in recess, if it desired so to be, and it was not in the power of the executive or his messenger to recall it to its sittings. But its

right to be in recess was no greater or higher than was the right of the executive to return the bill in question for its reconsideration; nor is there any reason why the free exercise of these admitted rights upon the part of the senate and governor respectively should bring them into collision. The senate has the unqualified constitutional power to adjourn for three consecutive days. Art. 4, sec. 15, Constitution. It must often happen that these three days will include the last day allowed the executive for the exercise of the veto power against the passage of a particular senate bill.

Now, if the mere fact of the recess of the senate, thus constitutionally taken, does operate to defeat, in a measure, the exercise of the veto power conferred on the executive by the constitution, then we have the strange spectacle of an irreconcilable conflict between the several clauses of that instrument itself, by which the senate, by the mere exercise of its own admitted constitutional authority to adjourn, violates the equally clear constitutional right of the executive to have it kept in session.

We are of opinion that the adjournment of the senate on March 31 did not curtail the veto power of the executive over the bill in question, nor should it even have embarrassed him in its exercise. The return should have been made in such manner as the circumstances would permit; it should, at all events, have left the bill and message beyond the executive control, and, if need be, in the immediate custody of some proper person, who would be likely to deliver it to the senate at the first opportunity. The best return that the circumstances would admit would, in our judgment, be a proper return. The maxim *lex non cogit ad impossibilia* would be applicable to such a condition of affairs. We know of no other rule, either, upon which the clear right of the governor to make the return to the senate can be reconciled with the equally clear right of the senate to be in recess at the time.

In the year 1864 a question of a similar character to this came before the supreme court of the state of New Hampshire. The constitution of that state is substantially the same as ours in the particulars involved, except that it limits the executive to five days in which to return a bill, instead of ten days, as in ours. The bill in question in that case, originating in the house of representatives of the state of New Hampshire, had been presented to the governor on Wednesday, August 17. The 21st of August falling upon Sunday, it resulted that the governor had the whole of Monday, August

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22, upon which to return the bill. But the house of representatives was not in session on that day, because on the preceding Saturday, August 20, both houses adjourned to Tuesday, August 23. The court say, upon this point, that it would, in their opinion, be sufficient for the governor to return the bill to the speaker, if within the five days; and they add, that "the house could not prevent the return of a bill by adjourning over any one of the five days, even though it should be the last one of the five, because the bill might, in that case, be returned, within the time limited, to the speaker, or to the clerk, or some other proper officer." 45 N. H. 610.

Having reached the conclusion that the facts do not show that the governor returned the bill to the senate within the meaning of the constitution, we proceed to inquire whether "*the legislature, by adjournment,*" prevented such return; for, if it did, the bill could not become a law by reason of the failure of the governor to return it within the ten days. We judicially know, and, if we did not, we are distinctly informed by the agreed statement of facts, that the late session commenced on Monday, the 6th day of December, 1869, and terminated on the 4th day of April, 1870. The adjournment of the 4th day of April was, in our opinion, the only adjournment which could have prevented the executive from making the required return within the prescribed time.

This results necessarily from the views we have expressed on the other proposition, in which we hold that the executive may return a bill to the senate, though it be not, at the moment of the return, in actual session. If it has adjourned for the day, or for three days, it still has an organized existence as a legislative body, with its president, secretary and other officers, to whom, under such circumstances, a substitutional delivery of the bill and message might be made, and whose official duty it would be to place the bill and message before the senate at as early a time as might be thereafter. Such a return, as we have said, would be the only one permitted by the circumstances, and when the bill should afterward actually reach the senate, it could then proceed to reconsider it, as required by the constitution in that respect.

But when a final adjournment of the legislature has occurred, there is an end to the organized existence of the senate. It has no longer officers to represent it for any purpose; nor could the bill, in the nature of things, ever be brought to its attention, for it would

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not be in session thereafter, nor be reconsidered by it, which is the purpose to be attained, for it would be itself no longer existing.

In the New Hampshire case, *supra*, the court say that "upon this point there can be no doubt. The adjournment referred to in the provision of the constitution is not, we think, the ordinary recess or adjournment from time to time during the continuance of the session, but the final adjournment at the close of the session. In fact, this is the only adjournment, we think, which can prevent a return of a bill within the time limited."

The seventeenth section of the constitution of California, relating to the adjournment of the legislature, which will prevent the return of a bill by the governor, will be found to be substantially the same as the seventh section of the first article of the federal constitution, which regulates the exercise of the veto power of the president over bills passing the senate and house of representatives of the United States. Its language upon this point is as follows: "If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the congress, by their adjournment, prevent its return; in which case it shall not be a law."

It seems to have been the opinion of the late Mr. Justice STORY (Com. on Const., § 891), that the only adjournment which could prevent the federal executive from returning a bill within the time prescribed must be an adjournment amounting to "a termination of the session." In the New Hampshire case, as has been seen, the legislature did adjourn; but the court held that a mere temporary adjournment, even of both houses, did not prevent a return of the bill then in question. In the case before us, however, it does not appear that the legislature—both houses—adjourned even temporarily. We do not think that the temporary adjournment of the senate alone from four o'clock P. M. of one day to the usual hour of meeting on the morning of the next day, drew after it the grave constitutional consequence—attributable, in our opinion, to no other adjournment than the final adjournment of the legislature itself at the end of the session—of preventing the return of a bill by the executive with his objections to its passage.

For the reasons given, and many others that readily suggest themselves, we think that the adjournment of the senate on the 31st day

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of March was not an adjournment by which the return of the bill was prevented.

The senate bill in question, therefore, became a law, and within the contemplation of the act of March 1, 1852, the second section of which is as follows: "Section 2. Every bill which has passed both houses of the legislature, and shall not be returned by the governor within ten days, having thereby become a law, shall be authenticated by the governor causing the fact to be certified thereon by the secretary of state in the following form: 'This bill having remained with the governor ten days (Sundays excepted), and the senate and assembly being in session, it has become a law, this — day of —, A. D. —'; which certificate shall be signed by the secretary of state and deposited with the laws in his office." And this bill should receive the prescribed authentication and be deposited with the other laws of the state.

But the governor refused to permit either the authentication or deposit, and retains the bill in his possession in the condition in which he received it from the enrolling committee of the senate.

And here we reach the only remaining question for our consideration in the case.

Can the performance of this duty be enforced through the instrumentality of the writ of mandamus?

In the voluntary submission which was made of the cause, no such question was presented for determination. By the stipulation, as we have seen, it was agreed that if the court are of the opinion that said bill did become a law, a peremptory mandamus may issue commanding the respondent to cause said bill to be authenticated, as provided by section 2 of the act of May 1, 1852, already cited.

Since then, however, the respondent has filed an exception to the jurisdiction of the court, because "the functions of the executive, in conjunction with the legislature as part of the law-making power, are not the subject of mandamus."

[We shall consider this objection in the form here stated, without, however, being understood as conceding that any executive function is "part of the law-making power."]

The attorney-general, too, in an able argument, brought to our attention since the submission of the cause, states the proposition in a more imposing form, and inquires: "Can it be successfully contended that the chief executive of a state — a correlative branch of the state government, equal in dignity with the court — can

commanded to do an act, which, in his executive opinion, may not be right?"

Undoubtedly, if the mere authentication of the bill, pursuant to the requirement of the statute, be a political power, such as the authority to grant reprieves and pardons, to convene the legislature in extraordinary session, to appoint to office, to accord or withhold the executive approval to legislative bills, or the like; or if there be any mere discretion in the governor to withhold such authentication, when the statutory facts have occurred, it does not belong to the judicial department to interfere with its exercise in any manner. The executive responsibility for the proper discharge of such trusts is directly to the immediate political representatives of the people, and ultimately to the people themselves.

But we think it would be difficult to show that the case at bar is one of that character. The functions of both the legislature in making the law, and of the executive in the exercise of the qualified veto power conferred upon him, must have been completely exhausted before the duty of authentication and deposit in the secretary of state's office can be asserted to have begun.

It is only because the bill has already become a law that the statute requires its authentication at all. It will be seen that the power and the duty to direct the authentication are inseparable, and that where the one exists there is no discretion to decline the performance of the other. The power to withhold the possession of a bill, which has passed both houses of the legislature in the proper form of legislative proceeding, and has thereby become a law under the operation of the constitution, either with or without the executive signature, is one which is unknown to our people, and has no place in the system of government prevailing here.

It is true that, in the earlier days of parliament, the sovereign is said to have exercised the power of altering and amending bills at pleasure, before according the royal approval, but at that time the asserted authority of the crown was almost absolute, and certainly under but little restraint at the hands of the representatives of the commons, the habitual language of whose addresses to the throne was: "Your poor commons beg and pray, for God's sake, and as an act of charity," etc. And it is also true that, at a much later period, the English princes of the house of Stuart, especially the duke of York, when upon the throne, asserted, as part of the royal prerogative, the power to dispense with the operation of the statutes of the

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realm in such special cases, and in regard to such particular individuals, as they saw fit. But even that claim of authority was utterly abrogated at the accession of the prince of Orange, and since the beginning of his reign no English sovereign has asserted it, or, indeed, even in any manner withheld the royal assent from the passage of any act of parliament whatever.

Under our system of government, based as it is upon a written constitution, defining distinctly the measure of power "to be exercised by the executive department, the authority to dispense with a statute, either in a particular instance or altogether, by withholding it from the depository of the law in the proper office, has not been conferred.

The statute of 1852, as we have seen, declares in *totidem verbis*, that a legislative bill, situated as this one is, "*shall be authenticated by the governor,*" etc. Whether, then, we regard the mere nature of the act to be done or the mandatory language in which its performance is enjoined, it is impossible to conceive of any case in which there could be less discretion left to the officer whose duty is thus declared by statute.

The authentication and deposit of this law in the office of the secretary of state is emphatically "an act which the law specially enjoins as a duty resulting from an office, trust or station," within the letter and intent of the statute regulating the writ of mandamus in this state. Statutes 1851, p. 124, § 467.

And it is settled by the uniform adjudications of this court that in *such a case* the writ will be issued against the governor of the state to enforce the performance of the act required. *McQuiey v. Brooks*, 16 Cal. 11; *Middleton v. Low*, 30 id. 596; *Stuart v. Haight*, January term, 1870. These authorities are supported by numerous cases adjudicated in other courts. In the case of *Marbury v. Madison*, 1 Cranch. 137, it was declared by the supreme court of the United States that "it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is determined." In the case of *Amos Kendall, postmaster-general of the United States, plaintiff in error, v. The United States on the relation of Stokes*, 12 Pet. 594, a writ of mandamus was sought against the postmaster-general of the United States, and its issuance was resisted by Mr. Attorney-General Butler. On the argument the attorney-general conceded the constitutional power of congress to invest the proper

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courts of the United States with jurisdiction to issue writs of mandamus to any ministerial officer of the United States to compel the performance of his duty. "And as the ordinary character of an officer's functions would not always determine the true nature of a particular duty imposed by law, he further agreed, that, if an executive officer, the head of a department, or even the president himself, were required by law to perform an act merely ministerial and necessary to the completion or enjoyment of the rights of individuals, he should be regarded, *quo ad hoc*, not as an executive, but as a merely ministerial officer, and, therefore, liable to be directed and compelled to the performance of that act by mandamus, if congress saw fit to give the jurisdiction."

And the opinion of the court, as delivered, is in accordance with this view.

In *Chamberlain v. Sibley*, the supreme court of Minnesota says: "This court will not undertake to compel the governor of the state to the performance of any duty devolving upon him as the chief executive, and properly pertaining to his office. In all such matters the executive is necessarily independent of the judiciary; but when some official act, not necessarily pertaining to the duties of the executive of the state, and which might be performed as well by one officer as another, is directed by law to be done by the governor, then any person who shows himself entitled to its performance, and has no other adequate remedy, may have a writ of mandamus against such officer, even though the law may have designated the chief executive of the state to perform the duty. We do not think that in such cases there is any ground for distinguishing the chief executive from any other officer who may be designated to do a mere ministerial act; otherwise a party might be entirely without remedy." 4 Min. 312.

The supreme court of Ohio, in the case of *The State ex rel., etc. v. S. P. Chase, Governor*, say: "However, therefore, the governor, in the exercise of the supreme executive power of the state, may, from the inherent nature of the authority in regard to many of his duties, have a discretion which places him beyond the control of the judicial power, yet, in regard to a mere ministerial duty enjoined on him by statute, which might have devolved on another officer of the state, and affecting any specific private right, he may be made amenable to the compulsory process of this court by mandamus."

† Ohio St. 535. See also the case of *Cotton v. Ellis*, 7 Miss.; N. C. 550.

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We are aware that there are authorities which hold that the executive is, *in no instance*, subject to the process of mandamus, because he is the chief of the co-ordinate department of the government. "But," in the language of a late commentator upon the law of mandamus, "the better doctrine seems to be that the governor is not an exception to the general rule; that all public officers may, by mandamus, be compelled to perform an act clearly defined and enjoined by the law, and which is merely ministerial in its nature, and neither involves any discretion nor leaves any alternative." Moses on Mand. 82.

It is said, however, that, by the terms of the statute regulating the writ of mandamus in this state, it can only be issued to an "inferior" person, and that the executive cannot be considered to be such a person.

The language of the statute in this respect is as follows: "It may be issued by any court in this state (except a justice's, recorder's or mayor's court) to any inferior tribunal, corporation, board or person, to compel the performance of an act," etc.

It is obvious that the word "inferior," as here used, is a qualification confined to the word "tribunal." The intention was to prevent any court from issuing the writ to any other court, superior in authority to itself, in any case in which the writ should be directed to another tribunal. It must, therefore, be one "inferior" to the court issuing the writ. As thus applied, the word "inferior" has a familiar signification, for "superior" and "inferior" are terms applied to the courts as indicating the general character of the jurisdiction they respectively exercise.

But, as applied to a "person," the word "inferior" has no intelligent signification. Who is, in law, an "inferior" person? Who, in this sense, a superior one? It is assumed, too, by the attorney-general, in the inquiry he has submitted, that the mere issuance of the writ of mandamus to the executive imports, upon the part of the court, a claim of official superiority over that officer. Nothing could be more unfounded. In the nature of things, no comparison between the authority of the governor and that of this court can be instituted. His duties are entirely executive in their nature; ours, exclusively judicial. Upon him rests the great obligation to see that the laws are faithfully executed; but it belongs to the nature of the judicial office to interpret and authoritatively declare the meaning of the laws applicable to the vested rights of the citizen.

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And upon principle it would seem, that, if the petitioner has a vested right by law to have the bill in question authenticated, the mere circumstance that the person whose duty it is to direct the act to be performed is an officer, even the chief officer of the executive department — and, as such, in the discharge of other and important duties — should not either impair the right or embarrass its assertion. The duty to direct the authentication imposed upon the governor by the statute might have been enjoined upon any other executive officer, and in such case would it be pretended that its performance could not be enforced? It might have been made part of the official duty of the secretary of state, independently of any direction to him by the governor, to affix the appropriate certificate to the bill; and in that case would it be any answer to say that he was an executive officer, and, as such, invested with executive discretion and authority in reference to certain other matters not involved in this question? And if it be conceded that the governor, because he is chief of the executive department, enjoys, for that reason, an absolute immunity from all judicial process, even when his duty in the given instance is ministerial, and a citizen has a vested right to have it performed, may not the same exemption from judicial process be set up by other officers of the executive department?

Would the attorney-general, the comptroller, the treasurer, and the other great officers of state, by reason of their mere official rank, be beyond the reach of the process of the law in all cases, and not be compelled to perform any official act, no matter how distinctly enjoined upon them? And if the state officers of the executive department are to be clothed with this immunity, it must be remembered that the sheriffs, recorders, etc., in the several county organizations, are also members of the executive department, and upon what principle could one of them be compelled to perform his duty in any case? It seems to us that the assertion of such a doctrine would draw after it the most serious complication and confusion, both in public and private rights, and practically disrupt the whole fabric of government.

We think that the writ should issue as prayed for, and it is so ordered.

TEMPLE, J., dissented so far as relates to the power of the court to award a mandamus.

Handley v. Pfister.

HANDLEY V. PFISTER, appellants.

(39 Cal. 233.)

Transfer of property for benefit of creditors — priority of lien.

Where a debtor, with the assent of certain of his creditors, placed his personal property in the hands of one of them, with instructions to sell it, and pay himself and such other creditors out of the proceeds, *held*, that the creditors for whose benefit the property was to be applied obtained a lien upon it and its proceeds superior to any which a general creditor could acquire by the subsequent levy of an attachment thereon.

THE facts are stated in the opinion.

S. O. Houghton, for appellants.

J. S. Bentley and *F. E. Spencer*, for respondent.

WALLACE, J. It appears that James Fitzgerald was justly indebted to several persons in divers sums of money, and, among the rest, to the plaintiff, who was, at the time, in his employ as a laborer.

Under these circumstances, and with the assent of these other creditors, he placed in the hands of the plaintiff certain wheat and barley, with instructions to sell it, apply its proceeds to the payment of these debts, and return the overplus, if any, to Fitzgerald himself.

Handley, with the assent of these other creditors, having received the property under these instructions, caused it to be sold for cash by John Carter, but the sum realized was insufficient to discharge the indebtedness. A portion of the proceeds being yet in the hands of Carter, the appellant, who was creditor at large of Fitzgerald, attached it as the property of Fitzgerald, applicable to the payment of this debt.

Carter subsequently, having been sued by the respondent, brought the balance into the court below, when Pfister & Co. being substituted as defendants on the record in his stead, the respondent recovered judgment.

The rights acquired by the appellants to the fund in question, through the levy of their writ of attachment, are precisely those

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which Fitzgerald, their debtor, had at the time of the levy. This was a right to the overplus remaining after the payment of these debts; but there was no overplus.

No question is made but that the respondent and those whom he represents were *bona fide* creditors of Fitzgerald, with a right to receive their money, and both a right and duty on the part of Fitzgerald to pay them. The steps taken by him to provide the means for their payment were such as the law permitted him to pursue; and when he, with the assent of these other creditors, placed this property in the hands of the respondent, with instructions to sell it and pay himself and them out of the proceeds, the respondent and those he represents obtained a lien upon it and its proceeds superior to any which the appellants could acquire by the subsequent levy of their process thereon. The authority to Handley to sell, and apply the proceeds to the payment of his own debt, was, in law, irrevocable by Fitzgerald, and would continue while the debt should subsist. And as having, with the assent of the other creditors associated with him, undertaken to apply these proceeds in part to the payment of these debts, the respondent became clothed with a power, coupled with a trust, for the benefit of those others, and which he was not at liberty to relinquish until these debts should have become, in some manner, discharged. *Walsh v. Whitcomb*, 2 Esp. 565; *Goodwin v. Bowden*, 54 Me. 425.

The case of *Morss v. Stone*, 5 Barb. 516, cited by the counsel for the appellant, does not present any point illustrative of this. The question there involved was, whether the goods in the possession of Dutcher, which he had undoubtedly received from the hands of Morss, had been purchased by him, or merely received to sell for account of Morss. If the former, then the creditor of Dutcher might subject them to the payment of his debt; if the latter, he could not do so. There it was not pretended that the bailor had made a delivery of goods to provide for the payment of his own debts, nor that the creditors had received or assented to a bailment, the purpose of which was to create a fund for their benefit.

The judgment is affirmed.

POORMAN, appellant, v. MILLS & Co.

89 Cal. 345.)

Certificate of deposit—mistake in—Gambling transaction.

On receiving a deposit of \$750 the defendants, bankers, issued a certificate of deposit, payable to the order of the depositor. By a mistake in filling up the body of the certificate, the sum was written "fifteen hundred," instead of seven hundred and fifty. The figures on the upper left-hand corner were for the correct amount. On the same day the payee transferred the certificate to an indorsee for value, and the indorsee transferred it to plaintiffs to be credited, and a portion to be applied on an indebtedness, which was done. In an action to recover the full amount named in the certificate, *held*, that the plaintiff, being a *bona fide* holder, was entitled to recover the full amount. *Held*, further, that the fact that the transfer to the first indorsee was made in a gambling room, and in a gambling transaction, did not render the transfer void under an act against gaming, there being no evidence that the consideration therefor was money or other thing of value lost or won at the games prohibited.

ACTION by an assignee against the makers of a certificate of deposit, for the sum of \$1,500 in United States gold coin, which was set out in the complaint as follows:

\$750.

BANK OF D. O. MILLS & Co.,

SACRAMENTO, October 18, 1866.

George Rosenbaum has deposited in this bank \$1,500, payable to himself or order, in United States gold coin, on return of this certificate properly indorsed.

D. O. MILLS & CO.

In the afternoon of the day on which this certificate was issued, Rosenbaum, the payee, indorsed it to Eli M. Skaggs, who thereupon delivered it to plaintiff, with instructions to credit the same to the account of Ewing M. Skaggs, which plaintiff did on the following day. On the same day he presented the certificate to defendants for payment, which was refused, on the ground that Rosenbaum had only deposited \$750, and that the sum of \$1,500 was filled in the body of the note by mistake. They tendered the \$750, which was refused.

In an action for the full amount of the certificate, judgment was rendered against defendants for \$750 only, whereupon plaintiff appealed.

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Coffroth & Spaulding, for appellant.

Robert Robinson, for respondents.

SPRAGUE, J. This instrument possesses all the requisites of a negotiable promissory note, payable on demand, and, with respect to the questions involved in the suit, must be regarded and treated as such.

The answer substantially admits the execution of the certificate, as charged in the complaint; denies that the plaintiff is the *bona fide* or legal owner or holder thereof; avers want of consideration for its issuance, exceeding the sum of \$750; and that the words "fifteen hundred" were inserted and written in the body of the certificate by mistake and inadvertence, in place of the words "seven hundred and fifty," which were intended to be, and should have been, written thereon—of which mistake plaintiff had notice when he received the same; and further avers, that the certificate was issued for and on deposit of \$750; and that the payee thereof received the same for and as a certificate of deposit for \$750 only—which sum defendants tendered to plaintiff on the presentation of the certificate; and further deny generally the allegations of the complaint. The case was tried by the court without a jury; and, without making any finding of facts, the court rendered judgment against defendants for \$750. Plaintiff, upon statement, moved for a new trial, which being denied, he appeals from the judgment and order denying a new trial. There is no conflict in the evidence as found in the record.

The certificate is to all intents and purposes a certificate for \$1,500 in gold coin. The superscription on the upper left-hand corner, in figures, is but a memorandum, and in no manner serves to vary, change, modify or control, the written words found in the body of the certificate, which distinctly specify the sum for which the certificate is issued to be \$1,500. The most that can be claimed for this memorandum, in figures, is that its presence on the face of the certificate serves to create a patent ambiguity; but this cannot be helped by averment, or evidence *aliunde*. The words written in the body of a certificate, bill or note, when plain, definite and certain, must control, without regard to the superscription in figures. Chitty on Bills (11 Am. from 9 Lond. ed.), 149-160; Story on Bills, § 42; Story on Prom. Notes, § 21; *Saunderson v. Piper*, 5

Bing. N. Cas. 425; *Mears v. Graham*, 8 Blackf. 144; *Payne v. Clark*, 19 Mo. 152.

Although the mistake and want of consideration alleged in the answer might be available as a defense *pro tanto*, as between the makers and the original payee, or an indorsee of the payee after maturity or dishonor, actual or constructive, or a holder *mala fide*, by indorsement from the payee before maturity or dishonor, such defense would not be available in a suit against the makers by a *bona fide* indorsee for value before maturity or dishonor, actual or constructive, or any subsequent holder through such original indorsee. Nor would such a defense be available to the makers in a suit, by a subsequent *bona fide* holder, after the certificate had been indorsed by the payee, in blank, and delivered to a *mala fide* indorsee before dishonor.

A negotiable bill or note, indorsed and transferred to a *bona fide* holder for value without notice by the payee thereof, before maturity or dishonor, actual or constructive, is relieved of all equities existing between the drawer or maker and the payee, and any subsequent assignee receives the same in like manner, relieved of all such equities. Story on Bills of Ex., §§ 181, 188; Story on Prom. Notes, § 178, and authorities there cited; 3 Kent Com. *92, top page, 113; *Chalmers v. Lanion*, 1 Camp. 383.

A note payable at a particular time is presumed to be dishonored after maturity. A sight bill or note payable on demand is presumed to be dishonored after a reasonable time shall have elapsed after its date, and if indorsed and transferred before such reasonable time has elapsed, the indorsee and holder *bona fide* for value takes the same, relieved of all equities existing between the original parties thereto. What such reasonable time is depends upon the circumstances of each case, and is a question of law to be determined by the court. Chitty on Bills, *379; Story on Bills of Ex., §§ 232, 325; Story on Prom. Notes, § 207, note 1; 1 Pars. on Con. (2d ed.) 217, note —; 1 Pars. on Notes and Bills, 264-266.

Although the maker of a negotiable promissory note, payable on demand, at common law is liable to a suit thereon the moment after the same is executed and delivered, and the statute of limitations immediately commences to run against such note, still it is not regarded as overdue or presumptively dishonored until the lapse of a reasonable time after its date; and we have been unable to find any case where, under any circumstances, if such note be indorsed

and transferred at any time during the business hours of the next day after its date, such time has not been adjudged within a reasonable time, and the holder protected as an indorsee before maturity or presumptive dishonor. *Weeks v. Pryor*, 27 Barb. 80; *Ranger v. Cary*, 1 Met. 373; *Seaver v. Lincoln*, 21 Pick. 268; *Parker v. Tuttle*, 44 Me. 467; *Dennen v. Haskell*, 45 id. 430; *Carlton v. Bailey*, 7 Foster, 234; *Emerson v. Crocker*, 5 N. H. 162; *Culver v. Parish*, 21 Conn. 408; *Martin v. Winslow*, 2 Mason U. S. C. C. 242; *Carll v. Brown*, 2 Mich. 401; *Atlantic De L. Co. v. Tredick*, 5 R. I. 179; *Wethey v. Andrews*, 3 Hill, 582; *Camp v. Clark*, 14 Vt. 390; *Dennett v. Wymans*, 13 id. 489; *Sylvester v. Crapa*, 15 Pick. 92; *Sanford v. Mickles*, 4 Johns. 227.

In the present case the certificate was indorsed in blank, and transferred by the payee on the same day of its date, and, on the evening of the same day, after dark, was, by the first indorsee, delivered to plaintiff, with instructions to credit the same to the account of Ewing M. Skaggs, which plaintiff did on the following morning, about eight o'clock, October 19th, by crediting Ewing M. Skaggs in account (who was then indebted to him in the sum of \$300) with \$1,500, and thereafter, during the forenoon of the same day, presented the certificate to defendants for payment. At the time the certificate was indorsed and delivered to Eli M. Skaggs, on the 18th of October, no sufficient time had elapsed since its date to authorize a presumption of dishonor; hence, the special defense set up in the answer could not avail, as in case of indorsement after maturity and dishonor.

The question then arises whether Eli M. Skaggs, the first indorsee, was a *bona fide* holder for value.

On the cross-examination of plaintiff's witnesses by defendants, it appeared that the payee indorsed and delivered the certificate to Eli M. Skaggs, at the rooms of said Skaggs, in the city of Sacramento, which rooms were occupied by said Skaggs for gambling purposes; that his business was gambling, and that the assignment was made in a gambling transaction; that Skaggs paid for the certificate \$100 in money and \$1,400 in ivory checks; and that previous to such transfer of the certificate by the payee he had been playing. Upon this evidence it is claimed by the respondents that the indorsement and transfer to Eli M. Skaggs was void under a statute of this state, entitled "An act to prohibit gaming." Stats. 1863, p. 723. But the evidence entirely fails to establish that the

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consideration for such indorsement and transfer was money or any thing of value *lost* by the payee or *won* by the indorsee, or any other person or persons, at any of the prohibited games, or any banking game, played with cards, dice or any other device; or, that the money or ivory checks received by the payee in consideration of such transfer was by him afterward lost, or in any manner hazarded at any prohibited game, or any other game of chance whatever; hence, the indorsement and transfer cannot be adjudged void on the ground that the consideration therefor was money, or any thing lost or won at a prohibited game. So far as the evidence discloses the consideration for the transfer, it was a valuable consideration, and the first indorsee received the certificate without notice, actual or constructive, of any infirmity or existing equity in favor of the makers; and, as between him and the makers, the special defenses set up in the answer could not have been made available, and they cannot, therefore, be made available as against the present plaintiff, whatever the consideration may have been for the subsequent transfer to him.

The evidence very clearly establishes that the certificate was issued by the defendants upon the deposit with them by George Rosenbaum of \$750 only, and that the sum stated in the body of the certificate as the amount deposited was by defendants inadvertently and by mistake written \$1,500 instead of \$750; and this the payee of the certificate must have known when he indorsed and transferred the same to the first assignee, on the afternoon of the day of its date; but the defendants by their mistake and inadvertence furnished him the means by which he was enabled to perpetrate a fraud upon innocent parties, if the special defense set up in the answer should prevail against the well-settled principle, that, whenever one of two innocent parties must suffer by the act of a third, he who enabled such third party to occasion the loss must bear it.

It follows from these views that the evidence fails to sustain the judgment, and that the judgment and order denying a new trial must be reversed and a new trial granted.

So ordered.

McGary v. Hastings.

MCGARY, appellant, v. HASTINGS.

(39 Cal. 300.)

Covenant of title — Eviction — Measure of damages.

It is not necessary that there should be an actual eviction by process of law to constitute a breach of covenant of title and quiet enjoyment. Such covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title, whether that title be established by judgment or not.

The measure of damage in an action on a covenant of title, after eviction, is the purchase-money and interest; but where the covenantee has purchased the paramount title, it is the sum actually and in good faith paid therefor and the amount expended in defending his possession, provided such damages shall not exceed the purchase-money and interest.

THIS is an action upon a covenant for quiet enjoyment. The complaint avers that, on the 13th of August, A. D. 1856, the defendant, for the consideration of \$9,000, conveyed to plaintiff and certain other parties a certain tract of land situate in Solano county. In the deed executed by defendant there was the following covenant:

And the said Daniel N. Hastings and his heirs, the said premises in the quiet and peaceable possession of said parties of the second part, and their heirs and assigns, and against the said party of the first part, his heirs, and against all and every person and persons whomsoever lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

That the plaintiff and his co-tenants immediately entered into possession of the premises as conveyed under the deed; that plaintiff's co-tenants conveyed to him, for a valuable consideration, their interest in the land on the 27th day of September, 1858, and plaintiff immediately thereafter took exclusive possession of the entire premises; that the only title claimed by the defendant at the time of his covenant was through Vallejo, who claimed to own a large tract of land, known as the Suscol Rancho, of which the premises conveyed were a part, under a grant from Mexico, and that Vallejo had no other title save under said supposed grant.

That at the time of said conveyance by defendant, the petition of Vallejo for the confirmation of the grant was pending in the courts of the United States, and was finally rejected on the 10th of June, A. D. 1862, and thereby the title of the United States to the

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land declared paramount; of all of which facts the defendant had due notice and full knowledge.

The plaintiff thereupon requested the defendant to repay him the purchase-money for said land, or to procure the title at his own expense, both of which the defendant refused to do. The plaintiff thereupon submitted to the paramount title, and, in conjunction with others, who were holding under Vallejo, sent an agent to Washington and procured an act of congress to be passed on the 3d of March, 1863, granting the right of preëmption to certain purchasers on the Suscol Rancho. The plaintiff, by reason of the conveyance from defendant, was one of the persons authorized to purchase under said act; and in pursuance of its provisions he acquired the title of the United States to said lands by certain letters patent dated on the 2d of March, the 10th of May, and the 29th of June, 1867. That by reason of the premises, the plaintiff has not been permitted quietly and peaceably to possess and enjoy the premises conveyed, but was evicted by the United States, the owner of the paramount title, by which eviction he has suffered damage.

To this complaint the defendant interposed a general demurrer, on the ground that the complaint does not state facts sufficient to constitute a cause of action, and also on the ground that the cause of action is barred by the statute of limitations. The demurrer was sustained, and the plaintiff, declining to amend, final judgment was entered for the defendant, and the plaintiff has appealed.

E. W. McGraw, for appellant.

F. & L. Reynolds, for respondent.

TEMPLE, J. The principal question involved in this appeal is, whether the acts set out in the complaint constitute a breach of the covenant of quiet enjoyment. The defendant contends that there must have been an actual eviction by a title paramount under the judgment of a competent court. Many early cases, especially in the state of New York, seem to sustain this view, and two cases are cited from our own reports. The first is the case of *Fowler v. Smith*, 2 Cal. 39. That was an attempt to resist the payment of purchase-money for premises conveyed, without special warranty, prior to the adoption of the common law in this state, and it was claimed that by the civil law certain covenants were implied. Justice MURRAY,

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in discussing the question, said that no covenants were implied, except those for quiet possession, and that to constitute a breach of that covenant there must be an eviction under a judgment of a competent court, founded upon a paramount title.

He relies upon the case of *Waldron v. McCarty*, 3 Johns. 471. In that case there was a foreclosure and sale of the premises under a mortgage which existed at the time of the covenant. The covenantee purchased at this sale and brought suit upon his covenant. The court held that there had been no eviction. It was not necessary in that case to hold that the eviction must in all cases be by legal process. This is a leading case upon that side of the question, and was followed by several others in that state. When understood, however, as establishing the general proposition that there must be an actual eviction under a judgment, these cases are contrary to the more recent decisions of that state, as we shall presently show. The other case from our reports is *Norton v. Jackson*, 5 Cal. 262. It was a suit for the purchase-money, and was resisted on the ground that there had been a breach of covenant of warranty, which, for all the purposes of this case, is identical with the covenant for quiet enjoyment. The purchaser was still in possession. Mr. Justice HEYDENFELDT, in delivering the opinion of the court, says: "There is no breach of the covenant without eviction, because there would be no correct measure of damages. It would be a hardship to allow the purchaser to remain in possession and recover the purchase-money also." In this case there had been no eviction, either actual or constructive; the purchaser was still in possession under the title of his covenantor; and no question can be raised as to the correctness of the decision. The broad statement in the conclusion of the opinion, that there must be an eviction by process of law, cannot be sustained by authority either in this country or in England. *Copp v. Wellburn*, 2 Dev. 390; *Foster v. Pierson*, 4 Levin, 617; *Stewart v. Drake*, 4 Hals. 141; Rawle on Covenants, 242.

Indeed, there are many cases where an eviction, without process of law, has always been considered a breach of the covenant, as in the case where the true owner at common law had the right to enter without suit, and where the covenantee was never able to obtain possession of the granted premises, which were in possession of the owner of the paramount title.

The case of *Waldron v. McCarty*, as understood, is contrary to

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the doctrine laid down in *Greenvault v. Davis*, 4 Hill, 643. In that case Mr. Justice BRONSON says: "There are some *dicta* in the books that there must be an eviction by process of law, but I have met with no case where it was so adjudged." And again: "Upon principle, I can see no reason for requiring an eviction by legal process. Whenever the grantee is ousted of possession by one having a lawful right to the property paramount to the title of the grantor, the covenants of warranty and for quiet enjoyment are broken, and the grantee may sue. * * * * *

"When the grantee surrenders or suffers the possession to pass from him without a legal contest, he takes upon himself the burden of showing that the person who entered had a title paramount to that of his grantor. But there is no reason why such surrender, without the trouble and expense of a lawsuit, should deprive him of a remedy on the covenant. The grantor is not injured by such an amicable ouster. On the contrary, it is a benefit to him, for he thus saves the expenses of an action against the grantee to recover the possession.

"It may be inferred in this case that the premises were unoccupied. Blodget then entered and still holds the land. This was an ouster or disseisin of the plaintiff, and he is well entitled to an action on the defendant's covenant."

In the case of *Fowler v. Poling*, 6 Barb. 165, Mr. Justice EDMONDS, after reviewing the decisions in that state, says: "From these conflicting authorities I deduce the true rule in this state to be, that there must be an actual disturbance of the possession; and where the covenantee is rightfully out of possession, either by due process of law or by an entry of the rightful owner, or by a surrender to one having a paramount title, there is an eviction, the covenant is broken, and an action will lie."

Mr. Rawle, in his treatise on covenants for title, has reviewed the cases upon this subject at great length, and we think an examination of the authorities cited by him, as well as those cited by counsel in this case, fully justifies the assertion that "there can hardly be said to be a class of cases, now entitled to rank as authority, which hold that an actual dispossession by process of law, consequent upon a judgment, is necessary to a breach of the covenant of warranty."

The true rule deducible from the recent cases is, that the covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title.

Nor is it necessary that the paramount title should have been established by judgment before the covenantee will be authorized to surrender the possession. It is enough that the true owner asserts his title and demands the possession. If it is his right to have possession, it certainly is the duty of the covenantee to surrender it to him. The covenant is for quiet possession and against a rightful eviction. To constitute a breach of this covenant, it cannot be required that the covenantee should maintain a wrongful possession and subject himself to be treated as a trespasser. The object of a suit by the true owner would be to compel the covenantee to do that which he ought to have done without suit. It could not have been contemplated by the parties to the covenant that the covenantee should refuse to do what the law enjoins upon him as a duty.

Nor can we perceive how the covenantor would be benefited by an eviction under a judgment. It was never considered necessary that the covenantor should have notice of the pendency of the suit. The judgment might be obtained without any real trial of the merits of the title; and besides, in the action upon the covenant, it is incumbent upon the plaintiff to establish that the title to which he has submitted is a paramount title.

Although there must be an eviction, it is not necessary that there should be an actual dispossession, of the grantee. If the paramount title is so asserted that he must yield to it, or go out, the covenantee may purchase or lease of the true owner, and this will be considered a sufficient eviction to constitute a breach. He then no longer claims under his former title. So far as that title is concerned, he has been evicted, and is in under the paramount title. Sugden on Vendors, 745 and note; *Loomis v. Bedel*, 11 N. H. 74; *Hamilton v. Cutts*, 4 Mass. 349; *Turner v. Goodrich*, 26 Vt. 709; *Sprague v. Baker*, 17 Mass. 586; Rawle on Covenants, 278, *et seq.* and cases. cited; *Noonan v. Lee*, 2 Black, 507; *Funk v. Creswell* 5 Clark (Iowa), 86; *Brady v. Spurck*, 27 Ill. 478; *Stewart v. Drake*, 4 Halstead, 139-275.

The next question which arises in this case is, whether there was such a hostile assertion of the paramount title as would authorize the plaintiff to submit to it. There is no controversy that the title was in the United States. The petition of Vallejo for a confirmation of the title was pending at the time of the conveyance. Vallejo's claim was rejected and declared invalid. It does not appear that any thing further was done on the part of the government to

McGary v. Hastings.

cause a settlement or sale of the land. In the case of *Rush v. Casey*, 39 Cal. 339, we held that, inasmuch as by section 13 of the act of congress of March 3, 1851, establishing a board of land commissioners for the adjudication of private land claims, it is provided, that all lands included in claims which shall be finally decided to be invalid shall be deemed part of the public domain of the United States, the final rejection of the claim operated, *proprio vigore*, to restore the land to the mass of the public domain. Without any further action on the part of the government, and by operation of law, the land became liable to entry for the purpose of settlement and preëmption. Of course, therefore, when the title of Vallejo was finally rejected, the only alternative left the plaintiff was to purchase the land from the United States, or it would be open to settlement and preëmption to all who possessed the proper qualification.

This is almost a parallel case to many which are found in the reports as to the hostile assertion of the paramount title. Thus, in *Loomis v. Bedel*, *supra*, a prior conveyance had been made by the covenantor. Upon the death of the prior grantee, the land was sold by his administrator at public auction, and purchased by the plaintiff, and it was held that these facts constituted an eviction.

In *Sprague v. Baker* there was a mortgage upon the premises, executed by a prior owner. The holder of the mortgage threatened to take possession under his mortgage unless the amount due upon it was paid. It was paid by the covenantee, and this was held to be an eviction. *Bemis v. Smith*, 10 Met. 194; see, also, *Dupuy v. Roebuck*, 7 Ala. 488; *Brown v. Dickerson*, 12 Penn. 372; *Stewart v. Drake*, *supra*. We are, therefore, clearly of the opinion that the facts stated in the complaint show such an eviction as will constitute a breach of the covenant, and the demurrer was improperly sustained on that ground. In the complaint the plaintiff has set out the facts which constitute the eviction, instead of averring the fact of an eviction under paramount title as the ultimate fact, of which the facts stated are the evidence. No objection is raised to this course in this case, as doubtless both parties were anxious to obtain an early decision as to the liability of the defendant, and many cases sanction this form of pleading. We are clearly of the opinion, however, that the other is the proper course; though, as the point is not raised, we do not decide this case upon that ground.

The transcript does not show when the suit was commenced, and I,

therefore, we cannot pass upon the question of the statute of limitations. The cause of action, however, did not accrue until an eviction, actual or constructive. In this case that would be at the time the plaintiff entered and began to hold under the paramount title.

It is well settled that the rule of damages, where there has been an actual loss of the premises, is the purchase-money and interest. Where the plaintiff has purchased the paramount title it is the sum actually and in good faith paid for the paramount title, and the amount expended in defending his possession, provided such damages shall in no case exceed the purchase-money and interest. The question as to whether the plaintiff can recover the costs of sending an agent to Washington to procure a law of congress authorizing the plaintiff to purchase his land cannot arise on this demurrer, which is general and to the whole complaint. On the facts stated, the plaintiff is entitled to recover the disbursements above mentioned, and the demurrer ought therefore to be overruled.

The judgment is therefore reversed, and cause remanded, with directions to overrule the demurrer.

PAGE, appellant, v. FOWLER.

(20 Cal. 412.)

Ejectment — Crops — Damages.

The owner of lands, who has recovered a judgment of ejectment against persons occupying under a claim of title, is not entitled to the crops grown and harvested by such persons before the judgment.

When, in such case, the owner obtained possession of the crops by replevin, held, in an action to recover their value, that the measure of damages was the highest market value within a reasonable time after the property was taken, with interest computed from the time such value was estimated.

THIS was an action to recover the value of a quantity of hay taken by defendant from the plaintiff in an action of replevin. The facts are stated in the opinion.

Wm. H. Patterson, for appellant.

Wm. Hayes, W. A. Wheaton and G. R. B. Hayes, for respondent.

TEMPLE, J. The main facts of this case are almost precisely the same as in *Page v. Fowler*, 28 Cal. 605, and 37 id. 100.

The plaintiff was in possession of about eight hundred acres of land, which had been inclosed for many years, and which he claimed to own under the so-called Suscol grant. In the summer of 1862, while crops put in by plaintiff were still growing upon the land, the defendants entered, claiming one hundred and sixty acres of land each, as preëmptioners. They built small houses upon their respective claims, where they afterward lived. They each possessed the requisite qualifications to become preëmptioners, and each took the necessary steps to enter the lands in the proper land office of the United States. They were unsuccessful, however, in their attempts to preëempt, and the plaintiff finally recovered a judgment against them for the land. In May, 1863, while they were in possession, and before the judgment in ejectment, they cut a quantity of hay upon the land, which was taken by the plaintiff by the writ of replevin in this suit.

There is no question that, at the time this action was commenced, the rights of the parties, with reference to the property in controversy, are exactly the same as in the former case of *Page v. Fowler*; but before this case was actually tried, plaintiff had recovered a judgment of ejectment against the defendants, and, as he claims, had been put into possession, and he now claims that the rule laid down in the former case cannot apply to this; that the reason why the plaintiff, out of possession, cannot recover against the defendant in the adverse possession, claiming to be the owner, is, because the personal action cannot be made the means of trying title; but that he may, under our system, by means of the 64th section of the practice act, commence his action for possession, and also separate actions for rents and profits, and for trespass or waste; and if, at the trial of his action of trespass or waste, he shows his judgment for the recovery of the land, it will be evidence of his right to recover for the trespass or waste; and that, upon the same principle, the plaintiff is entitled to recover in this case. I know of no warrant for this construction of the 64th section of the practice act; but, independently of that, I think the proposition not maintainable upon principle.

It is undoubtedly true, that, at common law, a person who had been ousted from land might, after a recovery and reëntry, maintain his action of trespass for the mesne profits and for waste, for the

reason that after reëntry the law supposes he has always been seized, and the acts of the defendant were a continuous trespass upon the rightful possession of the plaintiff; but no case has been cited in which this principle has been held to make the owner of the land out of possession, under such circumstances, the owner of the crops grown and actually harvested by the defendant. The very fact that he may recover the rents and profits of the land shows that he cannot recover the crops; for, as was well said in the case of *Stockwell v. Phelps*, 34 N. Y. 363, the owner of the land, in such cases, does not recover the value of the crops raised and harvested, but the value of the use and occupation of the land; and the annual crops of grain and grass, which contain both the value of the use of the land and the labor of the farmer, do not, under such circumstances, belong to the owner of the land. It would be an oppressive rule to require every one who, after years of litigation, perhaps, may be found to have a bad title, to pay the gross value of all the crops he has raised; and it would be an inconvenience to the public if the bad title of the farmer to his land attached to the crops he offered for sale, and rendered it necessary to have an abstract of his title to make it safe to purchase his produce.

Nor do I see that the act of congress of March 3, 1863, allowing the right of entry of these lands only to the *bona fide* purchasers under Vallejo, affects the rights of these parties to the hay. If it be admitted that the defendants entered upon the lands in good faith, with the honest intent to preëempt them, and so held them until March 3, 1863, the same possession continued, with the same character and rights, until they were dispossessed and the plaintiff reëntered. This proposition is established in *Stockwell v. Phelps*, *supra*.

The case of *Kimball v. Lohmas*, 31 Cal. 154, seems to modify, somewhat, the doctrine in *Page v. Fowler*, although no allusion is made to that case. It was for wood cut upon the land of the plaintiff, which was in the actual possession of the defendant. Mr. Justice SANDERSON, in rendering the decision, challenges the reasonableness of the rule in *Halleck v. Mixer*, 16 Cal. 574—affirmed in *Page v. Fowler*—and says it is of feudal origin, and that, upon authority, it is not easy to say what it is or where it came from, and that there is very little principle involved in it. He says: "The wood in question, having been cut from the land of the plaintiff, is as much his property now as before it was cut. By the severance

from the freehold, it was changed from real to personal property, but its title was unaffected. So are all the cases. If, then, it is his property, why is he not entitled to an action for it? Why limit his remedy to ejectment and damages?" He then says that adverse possession is of two kinds—the one without color of title, and the other under claim of title, founded upon a written instrument, as a conveyance or a decree or judgment of a court. By the last ought to be understood, perhaps, possession under color of title, or *bona fide* claim of right; for, in the case of *Page v. Fowler*, the defendants claimed neither under a written instrument, as a conveyance, nor under a judgment or decree, and yet this court held their entry and possession as preëmptors, under the laws of the United States, coupled with the fact that they actually entered, or attempted to enter, the lands in the proper land office, and were then contesting the right of the plaintiff, was a sufficient adverse possession, under the rule in *Falleck v. Mixer*. As to actions for timber, or for taking away the substance of the estate itself, the observations in *Kimball v. Lohmas* may be just; but, so far as they affect the annual crops, at least, I think I have shown there are reasons for the rule which are not derived from the feudal relation or founded upon the over-vice technicalities of the common law, nor yet upon the reason most frequently given for the rule—that title cannot be tried in a mere transitory action. I am not aware, however, that any distinction has ever been made between the two cases. The conclusion in *Kimball v. Lohmas* is entirely consistent with the other cases upon the subject, for there the defendant had no title or color of title; and all the cases show that there must be something more than a mere assertion of title. The court, in such cases, will look into the case to see if there is in reality a claim of title to try. *Harlan v. Harlan*, 15 Penn. 507.

It was undoubtedly erroneous to enter a joint judgment against the plaintiff in favor of the defendants. The entire theory of the defendants was opposed to the idea that there could be any community of interest or ownership in the property; but, as this was an error which does not injure the plaintiff, we would not probably be justified in reversing the judgment on that ground alone.

The only remaining question in the case is as to the rule of damages adopted on the trial. The plaintiff having failed to make out his case, of course the defendants were entitled to recover the value of the hay taken and disposed of by him. The hay was taken in

May, 1863, at which time it was worth, in the condition it was in, from three to five dollars per ton. It was baled at an expense of three dollars per ton, hauled to Benicia at an expense not proven, and from there shipped to San Francisco at an expense of two and one-half dollars per ton. It was sold at San Francisco at twelve and one-half dollars per ton, which is not questioned as being the highest price that could have been obtained for it. The defendants proved that in 1864, which was a year of great scarcity — sometimes called the year of the drought — hay was worth from thirty-eight to forty dollars per ton. At the request of defendants, the court instructed the jury that, “in assessing the value of the property, they might find the highest market value at any time since the hay was taken by the plaintiff, with interest,” etc. Under this instruction, the jury assessed the value of the property according to the price in 1864, and the defendants recovered \$25,763.23 for property which, at the time it was taken, was not worth more than \$2,500. As the trial was in November, A. D. 1869, under the rule the value could as well have been estimated by the market price at the time of trial, and, if the value of hay had then been greater than at any previous time after the taking, that course would undoubtedly have been pursued.

When we consider that the object to be attained by this rule is indemnity for loss actually sustained, the result in this case is sufficiently startling. But the rule is claimed to be of universal application, and as to a large class of personal property — to wit, perishable articles — its operation is still more manifestly unjust. If a quantity of fruit — strawberries, for instance — in the season of their greatest abundance, were taken under circumstances which would entitle the owner to indemnity only, and a suit to recover their value were immediately commenced, the trial would not be likely to occur for many months. In the mean time the season of plenty has passed, and the fruit bears an extraordinary price. Nevertheless, by this rule, he is permitted to recover the enhanced value which he could never have realized, and this under the pretense that it is necessary to indemnify him for his actual loss. This is, of course, an extreme case, and may be said to prove only that there should be exceptions to the rule; but I think that the rule is necessarily liable to work injustice in every case. In the cases where it has been enforced it is said to apply only to articles which fluctuate in value. If there is any thing which can be said to have a market value that does not

fluctuate, of course it can make no difference when the value is ascertained. This distinction, therefore, might as well be omitted, and the rule applied indiscriminately to all descriptions of personal property. If goods belonging to a merchant, and designed for immediate sale, were taken, the trial of a suit brought to recover their value might, for reasons well understood by every member of the bar, and in the usual course of things would, be postponed for years. The highest price might be ten years after the sale, and yet it would be morally certain that, had the goods not been taken, the owner would have disposed of them within the next few months. It is obvious that the damages in such a case (and the supposed case is the general rule) might be grossly unjust, and have very little reference to the loss actually sustained.

Without the possibility of loss, the owner is allowed the range of the market for many years in which to choose his price, and perhaps realizes enormous profits, in the face of proof to a moral certainty that, had he kept the goods, he would not, and perhaps could not, have received them. The best possible speculation would be to have one's property taken by a responsible person, and this under a rule which only indemnifies for actual loss, and does not permit speculative or hypothetical damages to be recovered, and in which nothing is exacted as a punishment to the wrong-doer.

The cases of *Douglass v. Kraft*, 9 Cal. 562, and *Hamer v. Hathaway*, 33 id. 117, are relied upon to support the rule adopted in this case. The first was for the conversion of certain warrants, and the court say that the plaintiff is entitled to the highest value after the conversion, and base their opinion upon the case of *Mercer v. Jones*, 3 Camp. 476, where ABBOTT, C. J., says, in substance, that the jury may, in their discretion, fix the value at any time after the conversion, and the case of *Cortelyou v. Lansing*, in which KENT says simply, that in trover the rule is not always the value of the goods at the time of the conversion. In this case no question arose as to the propriety of estimating the value by the market price at an indefinite period after the taking.

In *Hamer v. Hathaway* the question was, whether the highest price between the taking and the trial, or the price at the time of the taking, was the rule. The court say it is not an open question in this state: that elsewhere there is a great diversity of opinion as to which is the proper rule; that it is important to have a settled rule for this state, and they approve that in *Douglass v. Kraft*. In

that case, also, as in most cases holding to this rule, the only question discussed was, whether the damages must be assessed at the value of the property at the time of the conversion. The court held differently, and, though no question was raised as to what would be the rule under different circumstances, say "some qualification of the rule may be found necessary where there has been unreasonable delay in bringing suit, or under certain special circumstances, which do not exist in the present case; but we are content to follow the general rule announced in *Douglas v. Kraft*."

If we leave this state, the cases are exceedingly numerous and very conflicting. It would be impossible to deduce any consistent rule from them; and I agree with Mr. Justice RHODES—in *Hamer v. Hathaway*—that it is, perhaps, more important to have a fixed rule than that it should be entirely above question upon principle; and the general rule adopted in this state, when properly qualified, commends itself to my mind as founded in justice, and I think the required qualification can be easily derived from the cases by which the rule was established.

In *Suydam v. Jenkins*, 3 Sandf. 614, Mr. Justice DUEB, in an opinion by far the most able and satisfactory I have been able to find upon the subject, reviews all the authorities upon this subject, both English and American, and, as I think, establishes, beyond question, that this doctrine never did prevail in England, and that the cases of *West v. Wentworth*, 3 Cow. 82, and *Clark v. Pinney*, 7 id. 681, were innovations upon the common law, and were founded upon an entire misapprehension of the English cases they profess to follow. I have carefully verified all the references in those cases, and fully concur with Judge DUEB, that those cases not only do not establish the proposition, but contain no allusion whatever to the subject. The English rule, so far as I can discover, has always been to leave to the jury, as a matter of discretion, the question as to the time the property shall be valued, except in the case of stocks, when the value at the time of trial was the measure of damages. In the United States, on the other hand, it has always been considered a rule of law, and the jury are allowed no discretion in the matter.

The doctrine is, therefore, as I think, of American origin, and it may be remarked that all the cases concur in admitting that the general rule is, that the damages are to be measured by the value of the property at the time it was taken, the doctrine in question being an exception to the rule; and though the exception has, perhaps,

become the rule, it may be well to bear in mind that it originated in an exception made on the ground that, in certain cases (where the market value is fluctuating), the prevailing rule did not do full justice. The exception ought not, therefore, to be carried beyond the purpose for which it was made. That being accomplished, the ordinary rule should prevail. The reason for it must have been that, in the usual course of trade or business, it was likely that the owner would have realized the enhanced value if he had not been deprived of his property. All the cases are upon the ground that otherwise he would not be completely indemnified. It could not have been intended to give him profits it is certain he would not have realized.

The case of *West v. Wentworth*, 3 Cow. 82, was the first case in which the doctrine is plainly asserted. It is a short case, founded upon a misapprehension of the English cases, and the reason of the decision, further than this erroneous citation of authorities, is not discussed at any length. In the case of *Clark v. Pinney*, 7 Cow. 681, the question was elaborately discussed, and this case may properly be considered the pioneer case upon the subject. The doctrine of *West v. Wentworth* is sustained, but with an important qualification. The court say: "In such case, therefore, the plaintiff is entitled to the highest price between the day when the delivery should have been made and the day of trial. But, where he delays the prosecution of his claim beyond the period which may be considered reasonable, for the purpose of endeavoring to make an amicable arrangement, he must be considered as assenting to the delay, and ought to participate in the hazard of it. In such cases we are inclined to think the rule of damages should be the value of the article at the commencement of the suit."

The case of *Smith v. Griffith*, 3 Hill, 333, was a case against a common carrier for goods damaged while in the possession of the carrier. This question was discussed, and the rule of damages is laid down as follows: "The law, in regulating the measure of damages, contemplates a range of the entire market, and the average of prices as thus formed, through a *reasonable period of time*."

The phrase "average of prices" is intended as a rule to ascertain what the market price is, and exclude exceptional sales at an extraordinary price, and taken in connection with other portions of the opinion, the extract shows the rule adopted in this case to have been the highest market price within a reasonable time after the property

was taken, or should have been delivered. In the case of *Romaine v. Van Allen*, 26 N. Y. 309, the cases upon this subject are said to be to the effect, that "if the plaintiff, without unnecessary delay, prosecutes his suit, the fluctuations in the price should be exclusively at the hazard of the defendant, and the plaintiff was entitled to the highest price between the day when the delivery should have been made and the day of trial."

In the case of *Wilson v. Mathews*, 24 Barb. 295, which was an action of trover, the plaintiff was allowed to recover the highest price intermediate the taking and the trial. The court, in rendering the opinion, remarks: "As no objection was taken on the argument that any delay had intervened, we assume that the plaintiff has not delayed the prosecution of his claim beyond the period which may be considered reasonable, and that, therefore, the proper rule of damages is the highest value of the property at any time between the day of its conversion and the day of trial."

In the case of *Cannon v. Folsom*, 2 Iowa, 101, it is said that the rule of damages for not delivering a commodity according to contract, where the price has been paid, is "the highest market price between the day for delivery and the time suit is brought, provided the plaintiff does not unreasonably delay the institution of the suit."

The case of *Scott v. Rogers*, 31 N. Y. 676, was by a principal against his factors for an unauthorized sale of his property. The court decided that the sale was unauthorized, and that the measure of damages was the difference between the price for which the wheat was sold and what it was worth a reasonable time after the date within which to commence the action. This ruling was sustained by the court of appeals in an extended argument upon this very question. After stating it would be unjust to allow the plaintiff the whole time allowed by the statute of limitations, in which to commence his action, and the time from the commencement to the trial in addition in which to fix the price, and that the fact that the right of property passes by the judgment can make no difference. Mr. Justice HOGEBOM, who delivered the opinion of the court, says the rule is settled "to allow the plaintiff the highest price prevailing between the time of conversion and a reasonable time afterward for the commencement of the action. Some of the cases carry the period up to the time of trial of a suit commenced within a reasonable time; as between these two periods, the time of commencing the suit and the time of trial, the rule is somewhat fluctuating."

What this reasonable time shall be has never been definitely settled, and may perhaps fluctuate somewhat according to the circumstances of the particular case."

In the case of *Pinkerton v. Railroad*, 42 N. H. 424, this rule of damages is rejected, and this reason, among others, given for it: "In that large class of cases where the articles to be delivered enter into the common consumption of the country in the shape of provisions, perishable or otherwise, horses, cattle, raw material, such as wool, cotton, hides, leather, dye stuffs, etc., to hold that the plaintiff might elect as the rule of damages, in all cases, the highest market price between the time fixed for the delivery and the day of trial—which is often many years after the breach—would, in many cases, be grossly unjust, and give to the plaintiff an amount of damages disproportionate to the injury. For, in most of the cases, had the articles been delivered according to the contract, they would have been sold or consumed during the year, and no probability of reaping any benefit from future increase of prices. So there may be repeated trials of the same cause by review, new trial or otherwise. Shall there be different measure of damages for each trial?"

In every case which I have been able to find, where this view of the subject was discussed at all, some qualification of the rule was insisted upon; and it may be safely affirmed that the unqualified rule laid down in this case has never been recognized as law anywhere, although, of course, there are cases in which the rule has been affirmed without allusion to the qualification; and if the adjudged cases were not so, a rule which would allow one the highest market price for seven or eight years as the measure of damages for conversion of hay—an annual crop, and almost always annually consumed—is too repugnant to our sense of justice and to the purpose the rule was designed to accomplish—indemnity for actual loss—to be allowed to stand, especially when the rule itself is not supported even by a majority of the adjudications upon the subject.

In many of the cases it is said that the plaintiff will be allowed the highest price intermediate the taking and the trial, if the suit has been commenced within a reasonable time, and prosecuted without unnecessary delay, and no intimation is made as to what the rule would be if the suit were not commenced within a reasonable time; but it is evident that the question of damages ought to be the same in either case. The time of the commencement of the action or trial would not seem to have any natural or logical con-

nection or relation to the question of damages; and the question as to whether a suit was or was not commenced within a reasonable time would rarely, if ever, depend upon any fact which would affect the indemnity to which the plaintiff is entitled. The reasonable time mentioned in the cases cannot mean a reasonable time within which to commence the action, independently of the question of damages. It must mean a time within which it would be reasonable to allow the plaintiff to take the highest market price as the measure of his damages. In other words, the rule deducible from the authorities is, that in cases affecting property of a fluctuating value, where exemplary damages are not allowed, the correct measure of damages is the highest market value within a reasonable time after the property was taken, with interest computed from the time such value was estimated. This is, in effect, the rule established in *Scott v. Rogers*, where this precise question was more elaborately discussed than in any other case.

The rule thus stated may be somewhat indefinite, but it is certainly not more so than the rule in the New York cases, which have reference to the commencement of the action or its diligent prosecution; and the rule thus stated has this advantage, that what is a reasonable time would always be determined with reference to the question of indemnity; and if the old standard of the value at the time of the taking be once departed from, I can think of no rule more definite which would not be arbitrary and liable to work injustice.

What would be a reasonable time within which to allow the injured party the range of the markets to fix the value, must depend in a great measure upon the circumstances of each case. In very many cases this could easily be fixed by the nature of the article, the use for which it was intended, or the usual course of business upon which value depended. The object of allowing this range at all, as I have said, is because the owner might, and perhaps would, have obtained the price, if he had been allowed to retain the property, and the object will control in fixing the limit allowed for estimating the value. When goods are taken from a merchant he should not be allowed a longer period than it would probably require in the usual course of business to dispose of them, or than it would be reasonable to suppose a business man would expect to hold them for a profit.

As to the annual products of the soil, which are raised for annual

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consumption, they are almost universally disposed of by the producers within a few months after they are harvested, and, I may say, invariably consumed, or otherwise disposed of, before the next harvest; and, in my judgment, a longer period than that ought never to be allowed within which to estimate the damages as to such property, at least without some proof that the property would have been retained.

In this case the property was taken by means of a writ of replevin, and, as the proof establishes, was disposed of shortly after it was taken. We are not called upon to inquire whether a different measure of damages should be adopted where the property has been retained and can be returned *in specie*. The price fixed was during the year 1864—at what period of the year is not definitely settled by the evidence, though most likely it was after harvest of the hay crop, as the value was proven by one of the defendants, who testifies that he sold hay at that price during that year. At all events, the instruction authorized the jury to estimate the value after that time; and as it does not appear that they did not do so, the judgment should be reversed, and it is so ordered.

NOTE.—See the case of *McLean v. Bovee*, 1 Am. Rep. 185, wherein it was held, that one who recovers land in an action of ejectment is entitled to the crops planted after the commencement of that action.—*REP.*

JONES v. GOODWIN, appellant.

(39 Cal. 498.)

Promissory note—Indorsement by one not a party.

If a person not a party to a note places his name in blank on the back thereof before delivery, he is to be regarded as an indorser, and demand and notice are necessary in order to fix his liability.

THIS was an action on a promissory note. The facts are stated in the opinion.

Wm. S. Wells, for appellant.

W. W. Pendegast and L. C. Hays, for respondent.

TEMPLE, J. The defendant Wilcox signed his name in blank upon the back of the note and before the delivery of the same.

After the note became due, but too late to charge Wilcox, as indorser, demand was made for payment, and, upon its refusal, notice given to Wilcox. It is claimed that the failure to make demand and give notice in time discharged defendant Wilcox.

A great diversity of opinion exists as to the nature of the liability of one, not being a party, who indorses his name in blank upon a note before delivery. In England he is held to be a guarantor, and his contract is, that the maker of the note will pay at maturity, or, if he does not, the guarantor will. No demand or notice is considered necessary as a condition precedent to fixing the liability of the guarantor, or to the commencement of the action; but a failure to make demand and give notice, together with proof of injury, is *pro tanto* a defense.

In some states, as in Massachusetts, Vermont and Louisiana, he is regarded as a surety or joint maker of the note, and unconditionally liable. In some states he is held to be a guarantor, and various effects have been given in these states to the contract of guarantee, sometimes being held to be conditional, at other times absolute; and very frequently parol evidence is admitted to explain what the contract really was. In other states, as in New York, Tennessee, Iowa, and, we may add, California, he is held as indorser.

So far back as 1852 the supreme court of this state, in *Riggs v. Waldo*, 2 Cal. 487, held that the liability of a guarantor, under such circumstances, was that of an indorser; and this case has been affirmed by numerous subsequent decisions. The respondent, however, claims that in these cases no demand and notice whatever had been made or given, and therefore it was only necessary to hold that demand and notice are necessary to fix the liability of a guarantor. We think, however, this is not a proper construction of the decisions. In *Riggs v. Waldo* the question was as to the nature of the liability of one who, not being a party to a note, indorses his name in blank before delivery; and it was held that "his undertaking is attended with all the liability and all the rights of an indorser *stricti juris*." It was held that demand and notice was necessary, because his liability was that of an indorser; otherwise no demand and notice would be necessary to fix the liability, nor could they become material except upon the question of diligence where loss has been sustained.

The decisions in this state are substantially in accord with those which hold that one who, not being a party to a negotiable bill,

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indorses it in blank for the purpose of adding to its credit, is an indorser, and in view of the diversity of opinion on the subject we should not now feel inclined to disturb the doctrine, even if it did not meet our approval.

But we think the doctrine of *Riggs v. Waldo* by far the most reasonable and just. There seems to be no difference between the undertaking of a general guarantor and that of an indorser, except that the former, being a party to the note, his contract is construed by the law merchant, while the undertaking of the latter is construed by the general law of contracts. Each undertakes that the maker will pay the note at maturity; and in case of being compelled to pay it for the principal, each has recourse upon his principal to recover the amount paid, and there is no good reason why they should not have equal opportunities to secure themselves from the assets of the maker. The law merchant has established what is due diligence, and what is a reasonable time within which demand and notice should be made to bind an indorser, and upon principle the same diligence should be used to charge one who has assumed the same responsibility as a guarantor.

Judgment reversed, and cause remanded for further proceedings.

NOTE.—In Massachusetts a person, not a party, placing his name on the back of a promissory note, at the time it is made, is held to be liable as maker. *The Union Bank of Weymouth v. Willis*, 8 Met. 504; *Hawkes v. Phillips*, 7 Gray, 284; *Draper v. Weld*, 15 id. 580. In the latter case it was held, that evidence to prove that the party put his name on the back of the note, with authority to fill the blank with a guaranty, was inadmissible against one who took the paper without notice. But if the payee afterward indorse above the signature of the third party, the latter then becomes an ordinary indorser, and his liability cannot be changed by parol evidence. *Clapp v. Rice*, 13 Gray, 408. See *Howe v. Merrill*, 5 Cush. 80. If the name be put on after the execution of the note, and as a separate transaction, it is held to be a guaranty. *Benthall v. Judkins*, 13 Met. 205. See also to same effect *Irish v. Cutter*, 31 Me. 538.

In Vermont it is held, that if one not a party indorse his name on a promissory note, he is *prima facie* liable as maker, but the real intention of the signer may be shown. *Sylvester v. Downer*, 20 Vt. 355; *Strong v. Riker*, 16 id. 554. See also *Perkins v. Catlin*, 11 Conn. 213; *Clark v. Merriam*, 25 id. 576; *Jennings v. Thomas*, 13 S. & M. 617; *Schollenberger v. Nehf*, 23 Penn. St. 189; *Schneider v. Schiffman*, 20 Mo. 571; *Watson v. Hurt*, 6 Gratt. 633.

In New York a person not a party placing his name on the back of a note, before the payee indorses it, is held to be an indorser. *Hall v. Newcomb*, 7 Hill, 416; *Sptes v. Gilmore*, 1 N. Y. 320; *Ellis v. Brown*, 6 Barb. 282; *Waterbury v. Sinclair*, 26 id. 455. See to the same effect *Vore v. Hurst*, 13 Ind. 551; *Wells v. Jackson*, 6 Blackf. 40; *Jennings v. Thomas*, 13 Sm. & M. 617; *Curston v. Sneed*, 336; *Fear v. Dunlap*, 1 Greene (Iowa), 381.

In the following cases a person so indorsing is held to be a guarantor: *Camden v. M'Koy*, 3 Scam. (Ill.) 437; *Cushman v. Dement*, id. 497; *Carroll v. Weld*, 13 Ill. 632; *Klein v. Currier*, 14 id. 237; *Webster v. Cobb*, 17 id. 459; *Fegenbush v. Lang*, 28 Penn. St. 193; *Watson v. Hurt*, 6 Gratt. 633; *Beckwith v. Angell*, 6 Conn. 315. See also *Ransom v. Sherwood*, 26 id. 437, and *Rey v. Simpson*, 22 How. (U. S.) 341. In all the states, except New York and Massachusetts, evidence of intention is admissible to rebut the legal presumption.—REP.

CHOYNSKI v. COHEN, appellant.

(30 Cal. 501.)

Trade-mark — Name indicating business.

The plaintiff gave to his place of business the name of "Antiquarian Book Store," by which name it became widely known. The defendant, having a rival store, adopted substantially the same name. *Held*, that the name could not be appropriated as a trade-mark.

THIS was action for damages for alleged violation of a trade-mark, and to restrain further violation.

O. L. Lane, for appellant.

Quint & Hardy, for respondent.

CROCKETT, J. The defendant's motion to set aside the default taken against him for a failure to answer was properly denied. The excuse given in his affidavit for his omission is fully denied by the counter affidavit of the plaintiff.

The only question which remains to be considered is, whether or not the complaint states a sufficient cause of action to support the judgment. If the complaint exhibits no cause of action, even a judgment by default will be reversed on appeal. *Abbe v. Marr*, 14 Cal. 210.

The action is to recover damages for a violation of the plaintiff's trade-mark, and to restrain the use of it in the future. The complaint alleges that in 1863 the plaintiff established a book, periodical and stationery store in San Francisco, and gave to his place of business the name of "Antiquarian Book Store," by which name it has ever since been known; that this name was placed upon his sign, stamped upon all articles sold by him, and used in his correspondence; that he advertised by that name in newspapers, and used it in his business transactions generally. The grievance complained of is, that the defendant has set up a rival establishment under the name of the "Antiquarian Book and Variety Store." It is plain that the plaintiff could not acquire any exclusive right to use as a trade-mark the terms "book store" separated from the word "antiquarian." Terms in common use to designate a trade or occupation cannot be exclusively appropriated by any one. Otherwise, only

one person would have the right to designate his place of business a "book store," "tinner's shop," "drug store," "hotel," etc. It must, therefore, depend upon the effect of the word "antiquarian," as used in connection with the words "book store," whether or not the plaintiff has acquired an exclusive right to the use of these words as a trade-mark. The word "antiquarian," as applied to a book store, can have no other meaning or effect than to indicate to the public that the proprietor deals in a certain class of books, to wit: ancient books, or books pertaining to antiquity. Any one reading the sign "Antiquarian Book Store" over the door would naturally expect to find there for sale either ancient books, or books treating on subjects connected with antiquity.

In any other sense the word "antiquarian" could have no significance as applied to a book store. In other words, it indicates only that a certain class of books are sold there. It could not, by even a forced construction, be made to signify that the plaintiff's business had been long established, and was of an ancient origin; for the complaint informs us that the business was established in 1863, and that it had the name of the "Antiquarian Book Store" from the beginning. It is plain that the object of the plaintiff in the use of the word "antiquarian" was simply to indicate that a particular class of books was sold there, precisely in the same sense that the words "Law Book Store," or "Medical Book Store," or "Divinity Book Store," would indicate that law, medical or religious works were for sale. If we are correct in this interpretation of the words, it is obvious the plaintiff could no more appropriate them as a trade-mark than could a dry goods dealer the words "French Silk Store," or a dealer in hats the words "Felt Hat Store," or a merchant the words "Ladies' Shoe Store," in which cases the words employed would simply notify the public that a particular class of merchandise, as contradistinguished from other merchandise of the same general description, was for sale there. In all such cases, the words employed are but an advertisement that the proprietor deals in a certain class of goods; and it would be a somewhat startling proposition to announce that the first shoe merchant who puts over his door the words "Ladies' Shoe Store" acquires the exclusive right to use these words as a trade-mark. In the case of *Falkinbury et al. v. Lucy*, 35 Cal. 52, this court had occasion to examine with much care the principles which underlie this case; and without repeating here the argument to be found in the decision of that case, it will

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suffice to say, that, upon reason and authority, not less than upon the principles decided in the case referred to, we are satisfied the plaintiff had no right to appropriate the words "Antiquarian Book Store" as a trade-mark; and, consequently, that the complaint contained no cause of action. Judgment reversed and cause remanded, with an order to the district court to dismiss the action.

TAYLOR v. SHEW, appellant.

(30 Cal. 536.)

Action on judgment rendered in another state.

An action may be maintained on a judgment rendered by a court of competent jurisdiction in another state, notwithstanding an appeal from such judgment is pending.

THE facts are stated in the opinion.

Jas. W. Winans, for appellant.

Scripture & Bugbee, and *John T. Doyle*, for respondent.

SPRAGUE, J. This is an action brought upon two judgments, alleged to have been recovered by plaintiff against defendant in the court of common pleas of the city and county of New York, state of New York. The complaint is in the usual form, containing a count for each separate judgment.

The specific denials of the answer, in the form presented, do not put in issue the material allegations of the complaint, and the substantive matter therein alleged in bar of the action does not constitute a defense thereto. *Scott v. Pilkington*, 110 Eng. Com. Law (2 Best & Smith), Q. B. 11; *Nill v. Comparat*, 16 Ind. 107; *Burton v. Reeds*, 20 id. 87; *Suydam v. Hoyt*, 1 Dutcher (N. J.) 231.

The substance of the matter alleged in bar of the action is, that within due time after the rendition of the judgments sued upon, defendant appealed therefrom to the court of appeals of said state of New York; perfected such appeal by filing an undertaking on appeal, as required by the laws of New York, in the sum of \$250

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caused the proper return to be made and filed with the clerk of said court of appeals, and otherwise duly performed all the conditions and acts required to be performed by him in the premises; and that said appeal was and is being prosecuted with all due diligence; that said appeal is still pending and undisposed of, and was so pending and undisposed of at the commencement of this action; and that no determination thereof can be had for six months or more.

The answer does not allege that the appeal, as taken and perfected to the court of appeals, from said judgments had, by the laws of New York, the effect of suspending the judgments thus appealed from, or of staying the execution thereof, nor is it alleged that the undertaking on such appeal was to the effect that the sureties thereon were bound, in double the amount named in the judgment, that if the judgment appealed from, or any part thereof, be affirmed, the appellant would pay the amount directed to be paid by the judgment, or that any order was entered staying proceedings upon or execution of the judgment.

In the absence of any proof to the contrary, the presumption is that the effect of the alleged appeal by the laws of New York is the same as in this state; and in this state such appeal would not stay execution or proceedings for the collection of the amount of the judgment appealed from, pending the appeal, nor destroy or weaken the force and effect of the record of the judgment as evidence of the facts or matters necessarily determined thereby.

Whether by an appeal from a judgment, in which appellant had given an undertaking on appeal in form and amount sufficient to stay proceedings for its enforcement, the effect of the record of the judgment as evidence is thereby suspended or nullified, is a question not involved in this case.

Judgment affirmed.

MERRITT V. GLIDDEN.

(30 Cal. 559.)

Bankruptcy—stay of proceedings on appeal.

After judgment in an action and appeal taken by the defendant, he was adjudged a bankrupt by the register in bankruptcy, and filed the adjudication in the appellate court. On application for a stay of proceedings, *held*, that the judgment was final within the contemplation of section 21 of the bankrupt act, and that the stay could not be granted.

THIS was an action for freight on a cargo of lumber. The necessary facts are stated in the opinion.

RHODES, C. J. (after deciding a question of practice):

After the cause was submitted to this court, on briefs to be filed, the counsel for the defendants, who are the appellants, filed in this court an adjudication of the bankruptcy of the defendants, rendered by the register of the district court of the United States for the district of California, after the appeal was taken. The purpose is, to have the proceedings in this court stayed, until the question of the defendant's discharge shall be determined.

The bankrupt act (14 U. S. Stat. 526, § 21) provides that "no creditor whose debt is provable under this act shall be allowed to prosecute, to final judgment, any suit at law or in equity therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceeding shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy, on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt, in endeavoring to obtain his discharge."

No authorities are cited by counsel, which throw any light on the question whether an adjudication of the bankruptcy of a party, against whom a judgment had been rendered, would have the effect to stay proceedings on an appeal which had been taken by him from the judgment.

The judgment from which the appeal is taken is, in our opinion, final, in the sense of the statute. It was not, we think, the purpose of the statute to suspend the right of the plaintiff to maintain in the appellate court the correctness and validity of a judgment, from which the bankrupt might choose to take an appeal, until the determination of the question of the discharge of the bankrupt. To give the statute that construction would place it in the power of the bankrupt to delay, and thus defeat, remedies to which the plaintiff was entitled, and that, too, in cases where the appeal would be dismissed on motion of the plaintiff.

Judgment affirmed.

NOTE. — *In re Metcalf*, B. R. Sup. 43; 2 Ben. 73, it was held, that a judgment rendered in the court below, from which the defendant had taken an appeal, was not a final judgment within the meaning of the bankrupt act, and that when proceedings were taken subsequent to the appeal, and the defendant declared a bankrupt, he was entitled to a stay. — REP.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

TUTTLE, appellant, v. HOAG.

(46 Mo. 33.)

Husband and wife — liability of husband for wife's debts.

A married woman, engaged in business on her own account, purchased goods on credit, to be used in that business, the husband having no connection with the business, nor in any way participating in the profits therefrom. In an action against the husband for the value of the goods, *held*, that, in the absence of proof that the husband had assented to his wife's conducting the business, he was not liable for the debt.

ACTION on a note for goods sold and delivered to the wife of defendant. The facts are sufficiently stated in the opinion.

Slayback & Haussler, for appellant.

Krum, Decker & Krum, for respondent.

WAGNER, J. This was an action upon an account which was tried in the St. Louis circuit court, on an appeal from a justice of the peace. Before the justice, judgment was obtained for the plaintiffs.

The following facts appear from the record: The goods sued for were sold and delivered to Mrs. Hoag, wife of the defendant, by the plaintiffs. Mrs. Hoag was carrying on business in her own name when she bought the goods. She went into business against her husband's consent. She and her husband were living together at

the same house where the wife carried on the business. The husband received none of the proceeds of the wife's business; he had a separate business of his own, and defrayed the family expenses. The wife did not pay any of the family expenses out of the proceeds of these goods, or out of the profits of the business. They were sold to her on credit; the account was opened in her name, and she made the payments which were credited on the account. The defendant never made any payments, and was never called upon to pay.

Upon these facts, the court sitting to try the cause, without the intervention of a jury, was asked by the defendant to make the declaration that the plaintiffs could not recover. The court refused this declaration, and, of its own motion, declared, as a proposition of law, that if defendant, Hoag, was living with his wife at the time the bill in question was contracted, and if, with his knowledge and permission, she purchased the goods for the purpose of carrying on the millinery business in the house where he lived, then such purchase should be deemed to have been made with his consent, and that she acted as his agent. Judgment was then given for the plaintiffs, which was reversed at general term, and the case is now brought here for review by appeal.

It is evident, from the circumstances of this case, that the declaration which induced the finding and judgment should not have been given. The case is brought here and argued upon a wrong hypothesis. The authorities referred to and relied on by the counsel for the appellant do not sustain the position he has assumed in this court. They mostly relate to cases where the wife has purchased necessities on credit, in which case the law presumes or implies an agency, or where an agency was proved as a matter of fact.

The husband is under a legal obligation to furnish the wife with what the law deems necessities, and whatever may be suitable and requisite to enable her to go according to her situation and degree in life; and if he is neglectful she may contract for such articles, and he will be held liable, on the ground of presumed authority. Such contracts are his, not hers.

A wife, as such, has no original or inherent power to make any contracts which are obligatory or binding on her husband. No such right flows from the marital relations existing between them. To give her a power, in any case, to bind him by her contract, made in his behalf, it must be by virtue of a power derived from him, and

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founded on his assent, though such assent may be either precedent or subsequent, and express or implied; and this is the light in which such contracts are universally viewed. When such authority is conferred, it is not by reason of any relation existing between them as husband and wife, but it comes more properly within those principles which, in ordinary cases, govern principal and agent. That the wife has the capacity to be constituted by the husband his agent, and to act as such equally with any other person, has long been an established and undoubted principle.

Mr. Selwyn, in his work on *Nisi Prius*, states the rule with great clearness and precision in treating of the liability of the husband as to contracts made by the wife during coverture. After laying down the general doctrine, that the relation of husband and wife is, in respect of the wife's contracts binding the husband, analogous to the relation of master and servant, he says: "Indeed, in contemplation of law, the wife is the servant of the husband;" and, after citing a passage from Fitzherbert to sustain that position, he continues: "From this passage, it appears that the husband is not liable for his wife's contracts, unless he has given his authority or assent;" and he then adds: "It is incumbent, therefore, on a creditor who brings an action against a husband, upon a contract made with his wife, to show that the husband has given such assent, or to lay before a jury such circumstances as will enable them to presume that such assent has been given; and, in the latter case, if such presumption is not rebutted by contrary evidence, the jury may find against the husband, but not otherwise, for the wife has not any power originally to charge the husband." Selw. *Nisi Prius*, 288. These principles are founded in reason, and are sustained by all the authorities.

The two strongest cases quoted by the appellants are *Petty v. Anderson*, 3 Bing. 170, and *Curtis v. Engel*, 2 Sandf. Ch. 287; but both are clearly distinguishable from the case at bar. In the former the husband was identified with the business carried on by the wife, assisted in it, and subsisted on the profits; when the bill was presented to him, he did not disclaim or repudiate it, but advised the plaintiff not to go to law, as he might have to take a less amount. These facts BEST, C. J., commented on in his charge to the jury, and gave it as his opinion that they might well infer an agency or assent from them.

In *Curtis v. Engel* the question was, whether the separate estate of a married woman was chargeable for a general debt incurred by

her. The wife carried on the millinery business in her own name, the husband aiding and assisting her in the management; and, upon the evidence, the court simply held that the goods were furnished to both husband and wife, and that the husband was liable, and that the credit was not given on the separate estate of the wife. But the facts in the present case are wholly different. The husband here gave no assent; on the contrary, he dissented. He had nothing to do with the profits; he rendered no assistance in the management of the business, and was not connected with it in any manner.

The law is well settled, that if a tradesman furnishes goods to a wife, and gives credit to her, the husband is not liable, though the wife lives with him, and he sees her in possession of the goods. *Bentley v. Griffin*, 5 Taunt. 356. In *Metcalf v. Shaw*, 3 Camp. 22, the defendant and his wife were living together. The goods were ordered by the wife alone, and she gave her own note to the plaintiff for the amount of the purchase. The action was brought by the creditor against the husband for the price of the goods. Lord ELLENBOROUGH said: "The action clearly cannot be maintained on the note, as the wife had no authority, general or special, from her husband, as his agent, to make it; and I think he is not liable for any part of the goods, on this plain ground: that they were not supplied on his credit, and the plaintiff looked to the wife alone for payment. The credit was given to the wife, and not to the husband." The cases are numerous affirming the same principle, and I am not aware of any authority asserting a contrary doctrine. *Connerat v. Goldsmith*, 6 Ga. 14; *Moses v. Fogartie*, 2 Hill (S. C.), 335; *Benjamin v. Benjamin*, 15 Conn. 347; *Shelton v. Pendleton*, 18 id. 417; *Taylor v. Shelton*, 30 id. 122; *Sawyer v. Catting*, 33 Vt. 486; *Carter v. Howard*, 39 id. 106.

If a married woman makes a contract or incurs an obligation, and has separate property, equity would subject such estate to the payment thereof. See the learned judgment of LEONARD, J., in *Whitesides v. Cannon*, 23 Mo. 457.

In a very recent case in this court it was held, that when a husband permits a wife to carry on business on her sole and separate account, all that she earns will be deemed to be her separate property, and disposable by her as such, subject to the claims of third persons properly affected by it. *Coughlin et al. v. Ryan*, 43 Mo. 99. So, in Vermont, where a husband suffered his wife to set up the millinery business in her own name, and to manage it at her own

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discretion, he having nothing to do with making the purchases, keeping the accounts or paying the debts of the business, and having furnished no capital for which he had not been repaid, and having had no communication with those of whom his wife made purchases, it was held that, on equity principles, the stock and property in the millinery shop should be treated as the separate property of the wife, and be held liable for her debts and subject to the demands affecting it. *Partridge v. Stocker*, 36 Vt. 108.

The plaintiffs having solely trusted the wife, and the husband having had no connection with the business, and there being nothing to show that he ever, in any manner, gave his assent thereto, I am of the opinion that this attempt to charge him cannot be sustained. The goods and the separate property of the wife might be reached by a proper proceeding in equity, but such a course has not been pursued.

The judgment will be affirmed.

BOEHNE V. MURPHY, appellant.

(46 Mo. 57.)

Continuing guaranty.

Defendant gave a letter of credit, asking plaintiff to let T. have "the paints, oils and varnishes, glass, etc., he wants. I will be security for the amount for what he will owe you." *Held*, to be a continuing guaranty.

THE case is stated in the opinion.

Garesche & Mead, for appellant.

J. J. McBride, for respondent.

BLISS, J. The defendant gave to one Tully the following letter of credit, addressed to plaintiff:

ST. LOUIS, March 28, 1867.

Messrs. BOEHNE & GERKEN, City.

GENTLEMEN: Please let Mr. P. Tully have the paints, oils, varnishes, glass, etc., he wants. I will be security for the amount for what he will owe you.

ANDREW MURPHY.

The plaintiffs let Tully have the goods from time to time, from the date of the order for about six months, amounting in all to \$575, and Tully made various payments, so as to reduce the amount due to \$145; to recover this balance the plaintiffs sue the guarantor.

The main controversy arises in regard to the construction of the guaranty, the action being based upon the assumption that it is a continuing one. The intention of the guarantor is certainly not very plain, and he now contends that he only designed to obtain a credit for a single purchase, in order to start a friend in business.

There seems to have been some difference among eminent judges in stating the principle that should govern the construction of papers of this kind—Lord ELLENBOROUGH, in *Merle v. Wells*, 2 Camp. 413, holding that the words should be taken most strongly against the guarantor, and, if he meant to be surety for a single dealing only, he should take care to say so; and Judge STORY, in *Cremier v. Higginson*, 1 Mason, 323, saying that, in a doubtful case, the presumption should be against the construction that the guaranty is continuing. But I do not know that there is any special rule that applies to this class of writings, and Chancellor KENT (2 Com. 557) thus states the rule that should govern us in the construction of all contracts: "The modern and more reasonable practice is to give the language its just sense, and to search for the precise meaning, and one requisite to give due and fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction. * * * The true principle of sound ethics is to give the contract the sense in which the person making the promise believed the other party to have accepted it, if he, in fact, did so understand and accept it." The supreme court of Connecticut, in *White v. Reed*, 15 Conn. 457, applied this rule of construction to a case of guaranty, and held that the words, "for any sum that my son George may become indebted to you not exceeding \$200, I will hold myself accountable," did not imply a continuing guaranty.

Is there any thing in the language of the present defendant, or in the circumstances in which the parties were placed, to indicate that the guarantor supposed that the guaranty was accepted as a continuing promise? But little light can be thrown upon the meaning by the numerous cases in the books, for the reason that, in each case, the intention of the parties is arrived at from the peculiar phraseology used and the object of the guaranty.

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Tully was about to go into business, and was without cash or credit. The defendant knew him, and he was a relative of his family. . "The paints, etc., he wants" constituted the stock he might, from time to time, need to carry on the business in which he was about to engage. Had all that was in the mind of the defendant been expressed, the order would have been something as follows: "My friend, P. Tully, is about to engage for the coming season in the business of house-painting, glazing, etc. Let him have the material he may want to carry on his business, and I will be security for any balance that may be found due you." This must have been the understanding, or we must suppose that the defendant meant to guarantee a purchase sufficient to stock a paint shop, or sufficient to complete any specific painting and glazing contract he might enter into. But painters, especially those without capital or credit of their own, are not in the habit of keeping a full stock of material on hand, but their custom is rather to purchase of the dealer as they are called upon to use it. It is not reasonable to suppose that defendant intended that his friend should stock a paint shop at his expense, but rather that he intended to aid him in performing such jobs of work as he might, from time to time, obtain. The order specifies neither time nor amount, and the phrase "for what he will owe you" would more naturally imply a balance due at the end of the painting season, or when the defendant should put an end to the credit, than a balance of the first bill he might purchase.

The order, as originally drawn, was without a revenue stamp, and one was afterward placed upon it. No issue was made in relation to the intent of the omission, and the objection to the introduction of the order was properly overruled. *Whitehall v. Shickle*, 43 Mo. 537. and cases cited,

The other judges concurring, the judgment of the circuit court is affirmed.

Coffey v. The National Bank of the State of Missouri.

COFFEY V. THE NATIONAL BANK OF THE STATE OF MISSOURI,
appellant.

(48 Mo. 140.)

Bank — re-organization under United States law — effect of change : Measure of damages.

When a bank, organized under the laws of a state, re-organizes as a national bank under the act of congress, it escapes none of its liabilities by the change.

In an action of trover against a bank, after its re-organization as a national bank, for the value of certain special deposits in coin made prior thereto, *held*, that the measure of damage was the value of the coin at the date of its conversion, with interest thereon.

THE plaintiff sues in trover to recover the value of a special deposit originally made with the Bank of the State of Missouri, March 20, 1865, consisting of \$90.95 in silver and \$1,415 in gold coin. It is alleged that the defendants, July 1, 1867, converted the deposit to their own use, the bank at that time having taken its present name and become organized as a national institution. The answer denies both the fact of the deposit and of the alleged conversion, but admits that certain packages were deposited, and avers that they were duly returned to the plaintiff.

At the trial the plaintiff read in evidence the act of March 5, 1866 (Sess. Acts, 1865-6, p. 15), authorizing the Bank of the State of Missouri to re-organize as a national institution under the act of congress, and also gave other evidence tending to prove the allegations of the petition, and to show that the re-organization contemplated by the act of March 5 was in fact effected prior to the alleged conversion of the plaintiff's deposit, and that said deposit had passed into the possession of the defendant. No available objection was made to the proofs. At the instance of the plaintiff the court, among other instructions, directed the jury, in case they found for the plaintiff, to assess as damages for the alleged conversion the currency value of the coin, the rate of premium having been agreed on between the parties. The defendants controvert the correctness of this instruction, and deny their legal accountability for the acts or negligence of the Bank of the State of Missouri.

Coffey v. The National Bank of the State of Missouri.

C. F. Burness, for appellant.

Crews & Laurie, for respondent.

CURRIER, J. 1. By the act of congress making provision for a national currency (U. S. Stat at Large, ch. 106, p. 112, § 44), it is provided "that any bank incorporated by special law, or any banking institution organized under a general law of any state, may, by authority of that act, become a national association under its provisions, by name prescribed in its organization certificate; and in such cases the articles of association and the organization certificate required by the act may be executed by a majority of the directors of the bank or banking institution; and that said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the said bank or banking institution into a national association under said act; and a majority of the directors, after executing said articles of association and organization certificate, shall have power to execute all other papers, and do whatever may be required to make its organization perfect and complete as a national association. The shares of any such bank may continue to be for the same amount each as they were before said conversion; and the directors aforesaid may be the directors of the association until others are elected or appointed in accordance with the provisions of said act." Under the legislation of the state and of congress, the Bank of the State of Missouri became a national banking association, as the evidence tended to show, and as the jury found the fact to be. It thus passed from one jurisdiction to another; but its identity was not thereby necessarily destroyed. It remained substantially the same institution under another name. The transition did not disturb the relation of either the stockholders or officers of the corporation, nor did it enlarge or diminish the assets of the institution. These all remained the same under the national as they were under the state organization. The bank neither lost any of its assets nor escaped any of its liabilities by the change. The change was a transition, and not a new creation. See *Grocers' National Bank v. Clark*, 48 Barb. 26; *Thorpe v. Wegfarth*, 56 Penn. 82.

2. The court laid down a correct rule of damages. It is but plain justice that the plaintiff should have back his deposit in specie, or else its value in currency. The rule of damages in trover is the

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value of the converted property at the date of the conversion, with the interest thereon. The plaintiff was entitled to the marketable value of his coin at that time. This subject is discussed in *The Bank of the State, etc., v. Burton*, 27 Ind. 426. There the court say: "While we have two kinds of money, made by statute exact equivalents for the purposes of ordinary tender and payment, and yet of notoriously irregular values in commerce, results will now and then follow the application of the law which are not consonant with justice. Must it be so in this case? It has been often held, that, where the amount of debt has been ascertained, the courts cannot, in view of the act of congress, recognize any difference between the gold dollar and the legal-tender note of the denomination of one dollar as a means of tender or payment. But it does not follow that when the bailee of specific gold coin, to be redelivered in specie, sells the same for a premium, and fails to redeliver it on demand, he shall not answer in damages to the amount which he has realized by the conversion. That he should have the right to make a profit for himself by his own wrongful act is a proposition having no foundation in justice, and is not sanctioned by any principle of law."

The case referred to was decided in accordance with the foregoing views, the court holding, that, when a bailee converted to his own use coin intrusted to his care, the recovery should be for the currency value of the coin. See also *Frothingham v. Morse*, 45 N. H. 545. In the case at bar the verdict of the jury established the fact that the plaintiff left with the defendant, or with the Bank of the State of Missouri — which, for the purposes of this suit, is the same thing — the amount of coin stated in his petition, as a special deposit, to be returned in specie on demand; that demand of it was duly made, and that the defendant neglected and refused to return the deposit upon such request. Such refusal was evidence of conversion, and, unexplained, was conclusive of the fact. There was no explanation, and the defendant is liable for the conversion, and, as already stated, the court gave the correct rule of damages applicable to the facts of the case.

3. The question as to the measure of diligence does not arise in the case. The bank does not put its defense upon the ground that the coin committed to its care was lost while in its custody, without fault or negligence on its part, or on the part of its officers. That is not its line of defense. It denies that it ever had possession of the coin, and insists that if it ever did have it the same was returned

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to the plaintiff. So the pleadings stand, and the case appears to have been tried upon that theory. The question, therefore, of diligence on the part of the bailee does not come up. It would seem somewhat absurd for a party to insist that he had kept with reasonable care, as a gratuitous bailee, and faithfully returned what never came to his possession.

Some other objections of a technical character are made in the brief of the defendant's counsel, but it is not perceived that the court committed any error that would warrant a disturbance of the judgment. It will, therefore, be affirmed. The other judges concur.

HARVEY, appellant, v. SULLENS.

(46 Mo. 147.)

Will — Fraud and undue influence.

Where a person, standing in a relation of confidence to a testator who was old and *in extremis*, prepared a will in his own favor, and procured a kinsman of his to witness the same, and caused the relatives and friends of the testator to leave the room while the will was read and executed, *held*, that the jury had a right to infer, from these facts and circumstances, fraud or undue influence, and that the *onus* was on the party propounding the paper to prove that it expressed the true will of the testator.

THIS case is brought here by appeal to review a judgment of reversal rendered in the general term of the St. Louis circuit court. The proceeding was commenced under the statute to set aside the will of Elizabeth Sip, which was admitted to probate in St. Louis county on the 1st day of December, 1864. The will bears date the 24th day of November, 1864, and devises to Sullens all the real estate of which the testatrix died seized, and bequeaths to five grandchildren and one great-grandchild small bequests — \$100 to each of her granddaughters, and \$100 and her clothes to her sister, Mrs. Maria Longworth, for "her kindness to the testatrix in her last sickness;" and also a bed to a girl of the name of Pritchett, who was a servant in the house of the testatrix; and \$50 each to her grandsons, and \$50 to her great-grandson. Sullens, the devisee,

wrote the will, is made executor, and gets about five-sixths of the whole estate.

Upon the trial in the court below, certain issues were framed and submitted to the jury, who found in favor of the will, and judgment was rendered accordingly, which was reversed in general term. The material question raised is, the action of the court on the trial, in refusing certain instructions asked by the plaintiffs.

The petition proceeds upon two grounds: first, that the testatrix was not of sound mind when the will was executed; and, second, that the defendant, Sullens, procured it by fraud and undue influence.

G. P. Strong, for appellant.

T. G. C. & G. W. Davis, for respondent.

WAGNER, J. Without undertaking to go into any minute detail of the evidence, the substantial facts appear to be these: The testatrix, Mrs. Sip, was an old lady about seventy-three years of age; kept house and resided on her farm. The witnesses all agree that, though uneducated, she possessed a strong mind and had good business capacity, but in the latter part of her life she became quite childish and irritable. Her immediate relations, grandchildren and great-grandchildren, and three sisters, were all poor, and there does not seem to have existed any particular enmity or unfriendliness between them. Sullens, the principal devisee and executor, was an entire stranger in blood to the testatrix; was her near neighbor; was on terms of the utmost intimacy with her; belonged to the same church, and occasionally took her to meeting in his wagon. That he had acquired her complete confidence is conclusively shown. The testatrix had made two wills several years previous to the one now in controversy, and it seems that Sullens wrote them both; but what disposition she made of her property does not appear.

In her last illness, when, in fact, she was *in extremis*, all hopes of recovery having vanished, Sullens, who was always attentive, is found at her bedside, conversing with her in so low a tone of voice, that her sister, Mrs. Longworth, although but a few feet distant, could not understand any thing that was said. A memorandum was then taken, and in the evening Sullens came back with the will, written by himself. On his way to the house of the testatrix he met a man by the name of Green, almost a stranger, and requested

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him to return and witness the will. Dr. Williams, a brother-in-law of Sullens, was already in the house. Sullens then asked all the household and those in attendance, including Mrs. Longworth, the sister, to retire from the room, which they did, leaving him, the testatrix and Dr. Williams alone in the room. It then appears the will was read to her, after which Green was beckoned by Sullens to come in, when, with the assistance of Williams, she made her mark, and acknowledged in the presence of those three, that it was her last will, and expired in three or four days thereafter. At the time of the execution of the will Sullens enjoined secrecy on the witnesses, and requested them to say nothing about it during the life of the testatrix, if she died in her then present illness.

An analogous question to the one here presented was discussed with some fullness by this court at the last October term, in the case of *Garvin's Administrator v. Williams et al.*, 44 Mo. 465. It was there attempted to be shown with what distrust and suspicion the law looks upon all transactions where persons occupying a special or confidential relation seek to obtain an advantage inconsistent with their position. The general principles therein laid down need not here be reiterated, and we shall therefore confine this examination to a more exact review of the question raised and directly involved.

It is within the experience and observation of every one that old persons *in extremis* may be easily imposed upon by those in whom they confide. Where, therefore, a party standing in this relation to such a testator prepares a will in his own favor, it cannot but excite suspicion, and create in the minds of those who are called upon to pronounce on it a desire to have other evidence than proof of the execution of the instrument and the testable capacity of the deceased. Where a person is so sick, worn out and enfeebled that he is a mere passive instrument in the hands of those who produce the will, or where he allows others to control and dispose of his estate in order to escape their offensive dictation and annoyances, it is evident such a will ought not to be permitted to stand; and if the person in whose favor or through whose influence the will is made, either for his own benefit or that of others, is conscious, as an ordinary person will be presumed to be conscious, that an unjust result was being obtained in having the will made as it was, and such result is attained through the agency of other minds than that of the testator, the will cannot be maintained. See *Gilbreath*

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v. *Gilbreath*, 4 Jones Eq. 142; *Dean v. Negley*, 41 Penn. St. 312; *Floyd v. Floyd*, 3 Strob. 44; *Woodward v. Jones*, id. 552; *Means v. Means*, 5 id. 167.

In *Barry v. Butlin*, 1 Curt. Ecc. 637, Baron PARKER, in delivering the opinion of the court, says: "The rules of law, according to which cases of this nature are to be decided, are two. The first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

In the case of *Sears v. Shafer*, 2 Seld. 268, the rule is thus stated: "A court of equity interposes its benign jurisdiction to set aside instruments executed between persons standing in the relation of parent and child, guardian and ward, physician and patient, solicitor and client, and in various other relations, in which one party is so situated as to exercise a controlling influence over the will and conduct and interests of another. In some cases undue influence will be inferred from the nature of the transaction alone; in others, from the nature of the transaction and the exercise of occasional or habitual influence."

It is certain that, in a case like the present one, the law regards the transaction with great suspicion. The clearest evidence is required that there was no fraud, influence or mistake. The presumption is against the propriety of the transaction, and the *onus* of establishing the devise to have been voluntary and well understood rests upon the party claiming; and this in addition to the evidence to be derived from the execution of the will conveying or devising the property. From the very nature of the transaction undue influence is presumed, and the absence of it must be shown by the party sustaining the devise; but the presumption is one of fact, and not of law, and may be rebutted by proper evidence.

The gross inequality exhibited by the testatrix in almost totally disinheriting those who had strong claims upon her bounty, and willing nearly all her property to an entire stranger in blood, is

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suggestive of unfairness, and requires satisfactory explanation. That she had the power to so dispose of her estate is undoubted, but its unreasonableness requires the clearest evidence that it was the deliberate offspring of her own unbiassed mind, and flowed from a free and uninfluenced volition.

We will now briefly advert to the instructions which the court refused to give, and which refusal is assigned as error. The first and second, in the shape in which they were drawn, were, I think, well enough refused. The third asked the court to charge the jury that if they believed from the evidence in the cause that Isaac Sullens was the principal devisee named in the paper writing propounded as the last will and testament of Elizabeth Sip, deceased, and that said Sullens wrote the same himself, and procured a kinsman of his to witness the same, and caused the relatives and friends of the deceased to leave the room while he and his said kinsman read, or pretended to read, the same to the said Elizabeth Sip, such facts and conduct on the part of the said Sullens were evidence of fraud and undue influence on the part of Sullens in procuring the said Elizabeth to make the paper writing as her will.

Perhaps the instruction is rather too broadly stated in declaring absolutely that the acts enumerated are evidence of fraud and undue influence, though I think they were proper to be considered by the jury, and from which they might deduce or infer undue influence or fraud, and with this modification it ought to be given. The fourth request or charge asked was to the effect that if the jury believed from the evidence that Elizabeth Sip, deceased, was, at the time of putting her mark to the paper writing propounded by the defendant, Sullens, old and infirm in body and feeble and childish in mind, and so incapable of transacting her ordinary business, then she had not sufficient capacity to make a will.

In all cases, as an abstract proposition of law, this instruction would not be quite accurate. Great contrariety exists in the adjudication as to what is necessary or sufficient to constitute testable capacity. In England, in all cases where the person is regarded as a fit subject of a commission of lunacy, he is *prima facie* incompetent to execute a will; and Lord ELDON, in *Sherwood v. Sanderson*, 19 Ves. 280, thus states the rule: "It must appear that the object of the commission is of unsound mind and incapable of managing his affairs." And in cases in this country it was said, that if one be able to transact the ordinary affairs of life, he may, of course, execute a

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valid will. *Tomkins v. Tomkins*, 1 Bailey, 92; *Coleman v. Robertson*, 17 Ala. 84. But this criterion cannot be regarded as a test in every particular case. However, I am inclined to the opinion that, under the circumstances here presented, the instruction was correct, and should have been given. The fifth instruction told the jury that if they believed, from the evidence in the cause, that the defendant, Sullens, was the principal devisee in the paper propounded by him as the last will and testament of Elizabeth Sip; that he wrote it himself, requested the subscribing witnesses to subscribe their names to it as witnesses, and further requested one of said subscribing witnesses, who was the only witness that knew any thing about the contents of said paper, to keep it a secret until after the death of Mrs. Sip, then they were warranted in considering such evidence as tending to prove that Sullens procured the said Sip, by fraud and undue influence, to sign her mark to the said paper.

The instruction is unexceptionable, and its merits have been sufficiently discussed in a prior part of this opinion. The sixth instruction asked, told the jury that undue influence was alone sufficient, if proved to their satisfaction, to impeach and set aside a will under it; and that, as a matter of law, if they were satisfied from the evidence, when taken as a whole, that the paper propounded by Sullens would not have been made by the said Sip and signed with her mark as her last will and testament but for the influence exercised over her mind and will by Sullens, then they should find that it was procured from the said Sip by undue influence, and that the same was not her last will. The seventh instruction told the jury that if they found from the evidence in the cause that the testatrix, Sip, signed the paper writing propounded as her last will and testament, and that she was coerced to do so by force, fraud or deceit practiced upon her by Sullens and another or others in his interest and acting at his request, then the paper writing was not the last will and testament of the deceased Sip.

We see no valid objection to either of the foregoing instructions, and think they should have been given.

For the error in refusing the instructions, we are of the opinion that the judgment of the general term was correct, and it will therefore be affirmed and the cause remanded for a new trial in conformity with this opinion. The other judges concur.

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GIBSON v. THE PACIFIC RAILROAD COMPANY, appellant.

(46 Mo. 168.)

Master and servant — Liability of master for defective machinery.

The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business, and where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of the work, the employer is liable, provided he knew or might have known, by the exercise of reasonable care, that the apparatus was unsafe.

THIS was an action for damages brought by the respondent, an employee of the appellant, a railroad company, against the company, on account of injuries received through the negligence and carelessness of the company in using upon its road defective and dangerous machinery. The respondent was a brakeman on the road, and, as such, it was his duty to assist in coupling cars to form a train, and the case shows that he was a careful and prudent man. While acting under orders of the conductor, the train was backing on a switch to take on an additional car, and, while engaged in inserting the link in the drawhead, the cars came so closely together that in withdrawing his hand it was caught between the deadwoods or buffers, and smashed so that he lost three fingers. There was evidence going to show that the officers of the road, and the master mechanic who had charge of the road and repair shops, were skillful and competent men, but it most clearly appears that the coupling apparatus as used on the cars which the respondent was coupling was dangerous and defective, and that the company was engaged in altering the cars in which a like defect existed, to make them conform to a better standard and consist with greater safety.

Judgment was given for the respondent in the court below, and the case is appealed here. The objections are to the action of the circuit court in giving and refusing instructions. For the respondent the court gave two instructions. The first was as follows: "If the jury find from the evidence in this case that the apparatus used for coupling the cars by which the plaintiff was injured, or either of them, from its make and construction, was unsafe, and the defendant knew thereof, or might have known thereof by the exercise of reasonable care and diligence, they are instructed that the

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defendant is liable to plaintiff for any injuries he has received in consequence of such defect in the make and construction of such apparatus, after it was known or ought to have been known by defendant, if they further believe that plaintiff was exercising ordinary care and prudence at the time he received the injury, and did not know of the defect in said apparatus, and that the same was not due to the carelessness of any fellow-servant of the plaintiff." The second instruction related to the measure of damages, and no point is made upon it in this court.

The appellant asked five instructions, three of which were given and two refused. The following were given:

"1. Although the car by which the plaintiff was injured was defective by having too short a spring, yet if the directors and superintendent of said railroad were ignorant of the defect of said car, and used due care and diligence in procuring its cars, and selecting careful and competent servants to construct and procure said cars, then the defendant is not liable."

"2. If the Pacific railroad selected competent and skillful subordinates and servants to supervise, inspect, regulate and control its freight cars while running on its road, and used due care in constructing and procuring said cars, then the plaintiff, being a servant employed on said road, cannot recover in this action."

"3. The plaintiff, as a servant in the employment of defendant, assumed all the risks belonging to the employment he undertook; if, therefore, the plaintiff was injured by and through the negligence of another fellow-servant, or person employed on said road, then the plaintiff cannot recover."

The following are the instructions of the appellant refused:

"4. If the Pacific railroad, the defendant in this cause, selected competent and skillful subordinates and servants to supervise, inspect, regulate and control its freight cars while running on the road, and if any defect in the car by which the injury happened was unknown to the board of directors representing the company, then the plaintiff cannot recover."

"5. The plaintiff, as a servant in the employ of the defendant, assumed all the risks belonging to the employment he undertook; if, therefore, the plaintiff was injured by and through the negligence of another fellow-servant in the employ of defendant, by means of the negligence of such fellow-servant in sending out or using a car with a spring in the drawhead defective by being too short, and if

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such defect was unknown to the board of directors of defendant, then the plaintiff cannot recover in this action."

Whittlesey, for appellant.

Terry, Stewart & Whiting, for respondents.

WAGNER, J. The principles of law which must govern in this case are not to be confounded with the rule which has so often been announced and adjudged, that a servant of a corporation who has been injured by the negligence, misfeasance and misconduct of his fellow-servant can maintain no action against the master for such injury, unless the servant by whose negligence or misconduct the injury was occasioned is not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master. *McDermott v. Pacific R. R. Co.*, 30 Mo. 115; *Rohback v. Pacific R. R. Co.*, 43 id. 187.

A workman or servant, on entering upon any employment, is supposed to know and to assume the risk naturally incident thereto; if he is to work in conjunction with others, he must know that the carelessness or negligence of one of his fellow-servants may be productive of injury to himself; and, besides this, what is more material, as affecting his right to look to his employer for damages for such injuries, he knows, or ought to know, that no amount of care or diligence by his master or employer can, by any possibility, prevent the want of due care and caution in his fellow-servants, although they may have been reasonably fit for the service in which they are engaged.

It is neither unjust nor unreasonable that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants and workmen happen, by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of those they could not foresee. The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and foresight; and, if he fails to do so, he is guilty of a breach of duty under

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his contract, for the consequences of which, in justice and sound reason, he ought to be responsible. *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, per BIGELOW, C. J.; *Cayzer v. Taylor*, 10 Gray, 274; *Seaver v. Boston & Maine R. R.*, 14 id. 466. Any other rule would be productive of the greatest injustice and wrong. The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the masters, that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe. His attention is exclusively due to the peculiar duties incident to his branch of the employment. He assumes the risk, more or less hazardous, of the service in which he is engaged; but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and which might be prevented by ordinary care and precaution on the part of his employer.

In England, where the principle has been so firmly established, ever since the decision in *Priestly v. Fowler*, that a servant cannot recover of his employer for the negligence or carelessness of a fellow-servant, the courts have universally held that the master will be liable for ordinary neglect in the use of defective machinery or apparatus from whence injury results. Upon this ground the English, the Scotch and the American law all concur. In *Patterson v. Wallace*, 1 McQueen, 748, Lord CRANWORTH says: "I believe, by the law of England, just as by the law of Scotland, in the actual state of the case with which we have to deal here, a master employing servants upon any work, particularly a dangerous work, is bound to take care that he does not induce them to work under the notion that they are working with good and sufficient tackle, while he is employing improper tackle, and, being guilty of negligence, his negligence occasions loss to them." The same view of the law was taken by Lord BROUGHAM in that case.

The case of *Marshall v. Stewart*, 33 Eng. L. & Eq. 1, was an appeal heard in the house of lords, from a judgment of the court of sessions in Scotland, in an action by the representatives of a miner killed by injuries arising from the shaft of the pit being in an unsafe state, owing to the negligence of the defendant, his employer. The law of Scotland was, throughout the case, treated as the same with the law of England. The servant, in that case, was killed

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while leaving his master's employment without proper cause. "A master," says Lord CRANWORTH, "by the law of England and by the law of Scotland, is liable for accidents occasioned by his neglect to those whom he employs." I quite adopt the argument of the solicitor-general, "that he is duly responsible while the servant is engaged in his employment; but then we must take a great latitude in the construction of what is being engaged in his employment;" and he further adds, that the liability of the master continues, "whatever he does in the course of his employment, according to the fair interpretation of the words *eundo, morando redeundo*; for that the master is responsible, and it does not, in my opinion, make the slightest difference that the workman had, according to the finding of the jury, no lawful excuse for going out, no lawful excuse for leaving their work." "The master," remarks Lord BROUGHAM in the same case, "who let them down is bound to bring them up, even if they come on their own business and not on his; he is answerable for the state of his tackle by which the lamentable accident was occasioned."

In *Byden v. Stewart*, 2 McQueen, 30, the lord chancellor, among other things, said: "The law of both countries (England and Scotland) makes a master liable for accidents occasioned by his neglect toward his servants."

In the case of *Dixon v. Rankin*, 14 Court of Sess. Cas. 420, the Lord Justice CLERK held, that "the master of men in dangerous occupations is bound to provide for their safety. This obligation extends to furnishing good and sufficient apparatus, and keeping the same in good condition; and the more rude and cheap the machinery, and the more liable, on that account, to cause injury, the greater the obligation to make up for its defects by the attention necessary to prevent such an injury."

In *Roberts v. Smith et al.*, 2 Hurl. & Nor. 213, the injury arose from a rotten and defective scaffold, over which the plaintiff, a bricklayer, was compelled to pass in the course of his employment; and, in consequence of its rottenness, it broke, and the plaintiff fell to the ground. The case decides the liability of the defendant if the injury arose from his negligence, he knowing the condition of the scaffold and the servant being ignorant thereof.

In *Williams v. Clough*, 3 Hurl. & Nor. 259, it was alleged in the declaration that the defendant was possessed of a granary, and ladder leading up to it; that the ladder was wholly unfit and unsafe

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for use; that the plaintiff was a servant, for hire, of the defendant; that the defendant, knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into his granary; that the plaintiff, believing the ladder to be fit for use, and not knowing to the contrary, did carry corn up the ladder to the granary, and, by reason of the ladder being unsafe, the plaintiff fell from it, and was injured. It was held, on demurrer, that the declaration was sufficient. The American authorities are equally decisive.

In *Mad River & Erie R. R. Co. v. Barber*, 5 Ohio St. 541, the court says: "If the defects which caused the injury were actually unknown to the company or the conductor, and were not discoverable by due and ordinary care and inspection, and yet were such as resulted from a neglect of reasonable and ordinary care and diligence on the part of the company, either in procuring or continuing to use cars and machinery beyond the time when they could be safely used, the company will be liable." In the same court, in *McGartrick v. Wason*, 4 Ohio St. 566, the general rule is declared to be, that an employer who provides overseers and controls the operation of machinery must see that it is suitable; and if a defect, unknown to a workman, injures him, which ordinary care could have prevented, the employer is liable for the injury.

So, in *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 565, the court says: "The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master, and this negligence may consist in the employment of unfit and incompetent servants and agents, or in furnishing, for the work to be done, or for the use of the servants, machinery or other implements and facilities improper and unsafe for the purposes to which they are to be applied."

In *Keegan v. Western R. R. Co.*, 4 Seld. 175, a railroad company which continued a defective and dangerous locomotive was held liable to its servant engaged in running such machine for an injury sustained by him (without negligence on his part) in consequence of such defects.

In *Fifield v. Northern R. R.*, 42 N. H. 225, the plaintiff, a brakeman in the employ of the defendant corporation, being injured without fault on his part, by their negligence in permitting the road to be blocked up with snow and ice, and their car to be out of repair, was held entitled to maintain an action to recover compensation for the damages by him so sustained.

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Under the instruction given for the respondent in this case, the jury must have found that he was exercising ordinary care and prudence at the time he received the injury, that he did not know of the defect in the apparatus used in the coupling of the cars, and that the injury was not due to the carelessness of any fellow-servant. The three instructions given for the appellant were as favorable as could have been asked. The argument is now pressed, that the last two instructions, numbered four and five, respectively, which were refused, should have been given, because there was no evidence that notice of the defect was brought directly home to the knowledge of the directors of the company, and that, for the same reason, the respondent's instruction, which declared that the company was liable if they knew, or might have known, by the exercise of reasonable care and diligence, that the apparatus was unsafe and dangerous, should have been refused.

The difference lies in what amount of care and diligence the master is bound to exercise in supervising and examining the machinery that he furnishes for the use of his servants. The testimony in the case tends strongly to show that the condition of the drawhead was not due to use or negligent repairing, but to improper and defective construction. The company fully recognized the defect, and were altering and improving the cars thus constructed.

But the instruction given for the respondent is well supported by authority, and is founded in reason. If, by reasonable and ordinary care and prudence, the master may know of a defect in the machinery he operates, it is his duty to be advised, and not needlessly expose his servants or employees to hazard, peril or mutilation. The servant has no means of ascertaining the facts; the master has, and, therefore, he should exercise that care which devolves on a prudent man in like circumstances.

In *Hayden v. Smithfield Manufacturing Company*, 29 Conn. 548, it was held, that a servant might maintain an action against his master for an injury caused by defective machinery, when the employer knew, or ought to have known, of the defect, and the servant did not know it, and had not equal means of knowledge.

In *Noyes v. Smith*, 28 Vt. 59, the declaration averred that the plaintiff was hired by the defendants to have the charge of and conduct and run an engine, and that, by virtue of said employment, it became the duty of the defendants to furnish an engine that was well constructed and safe, etc., but that they carelessly and wrong-

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fully furnished an insufficient engine; that the insufficiency was unknown to the plaintiff, and, "but for want of all proper care and diligence, would have been known to the defendants;" and that, while the plaintiff was in the careful and prudent use of said engine, it exploded, on account of said insufficiency, and injured the plaintiff, etc. *Held*, on demurrer, that the declaration disclosed a sufficient cause of action.

To the same effect is *Ryan v. Fowler*, 24 N. Y. 410, where it was decided that the master was responsible to his servant for injuries received by the latter from defects in the building in which the services were rendered, which the master knew or ought to have known.

Upon a full view of the record, I have been unable to discover any error. I think that the law was properly declared, and that a fair trial was had. I therefore advise an affirmance.

Judgment affirmed.

COPELIN v. THE PHOENIX INSURANCE COMPANY, appellant.

(46 Mo. 211.)

Marine insurance — Abandonment — Total loss.

To warrant the abandonment of a stranded vessel as a total loss, it must appear, to the satisfaction of the jury, that the delivery of the vessel from the peril was, upon reasonable grounds, judged to be impracticable, or not to be effected unless at an expense that would absorb all her value.

The owner of a vessel, abandoned as a total loss, is not bound to receive her from the underwriters, if there is any material deficiency in her repairs, nor unless she be repaired and returned within a reasonable time.

THIS was an action brought upon a policy of insurance against the underwriters in favor of the plaintiffs, by which the steamboat Benton was insured for \$5,000 for one year, commencing on the 26th day of March, 1865. The policy is in the usual form of marine insurance. The evidence in the case tends to show that on the morning of the 3d day of November, 1865, while the Benton was descending the Missouri river, a number of miles above Omaha, she was driven by a heavy wind upon a large snag with such violence that the snag went through her hull, making a large hole,

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from which she soon filled with water, and that she was run upon a bar as far as possible; that her officers immediately erected pumps and bulkheads, and commenced pumping, and used their best efforts to raise her, and that they worked for several days without success; that all the time the water was washing out from under midships and her bow; that her bow was settling down. She was in a bad condition, being twisted, and in danger of breaking in two. While in this condition, the officers concluded that they could only save her machinery, and that all the balance would be a total loss. These facts they telegraphed to the plaintiff, at St. Louis, and received instructions from him, and they say from the defendant also, to proceed to wreck her as the only means of saving any thing. The weather at that time was cold, and the river about closing with ice. It appears that on the 21st day of November the defendant took possession of the boat or wreck for the purpose of raising or repairing her, and restoring her to the plaintiff; that on that day, as plaintiff considered her a total loss, he made a formal written abandonment of her to defendant; that on the 27th day of November defendant succeeded in raising the hull, as the river had fallen very much in the mean time. Defendant started with her for St. Louis on the 20th day of March, 1866, being prevented from going earlier, as is alleged, on account of the ice, and she arrived at that port on the 12th of April thereafter. She was then put upon the docks to be repaired, and, on the 9th day of May, 1866, she was tendered to the plaintiff, six months after the loss, and two months after the expiration of the policy. The actual repairs cost \$1,764.76, and the expense of raising her was \$12,132.82; and she was worth, when tendered to the plaintiff, \$12,000 only. Her valuation in the policy was \$45,000.

There was further evidence going to show that defendant did not use proper diligence in making the repairs, and that all the repairs that were done could have been done within four days after the boat reached St. Louis; that the defendant did not repair the injury done by the sinking, and that it well knew this; that, in fact, it would have cost from \$5,000 to \$6,000 additional to have repaired the boat and put her in substantially as good condition as she was when she struck the snag; and that she was not properly repaired or tendered within a reasonable time. The case was tried before the court, and upon certain declarations of law the verdict was for plaintiff.

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Morse & Herzer, and Lackland, Martin & Lackland, for appellant.

Glover & Shepley, and Rankin, for respondent.

WAGNER, J. Without particularly or in detail noticing the instructions given for the respondent, we will simply state the law, as we understand it, in regard to the question of abandonment.

In *Norton v. Lexington Fire, Life and Marine Insurance Co.*, 16 Ill. 235, the court, after a very free discussion of the subject, say, that the right to abandon must be determined by the judgment of experts, applied to the condition of the vessel at the time of abandonment; and although the cost of saving and repairing the vessel after her abandonment may be less than fifty per cent, yet if, at the time, the facts apparently justified an abandonment, it will be good.

In *Ruckman v. Merchants' Louisville Insurance Co.*, 5 Duer, 36, DUEK, J., a very high authority on the law of insurance, declares in the opinion that "the true principle upon which the whole doctrine of abandonment may be said to rest, and by which alone its application, in converting a partial into a total loss, can be justified, is that which, in the leading case of *Anderson v. Wallis*, 2 M. & S. 240, is stated by Lord ELLENBOROUGH with his accustomed brevity and force. It is, that an abandonment is never to be authorized except when, at the time, the loss was actually total, or in the highest degree probable; and if we analyze the cases that have settled the law as it now prevails in England, we shall find that it is this principle that runs through, explains and justifies them all. To select an example from each class of cases: When the vessel insured is captured, there is an actual total loss; but, as she may be recaptured or restored, an abandonment is necessary to warrant its recovery; a title must be vested in the insurers to give them the benefit of the *spes recuperandi*. But when the vessel is stranded, the question whether the loss shall be deemed partial, or so far total as to warrant an abandonment, will depend upon the nature and extent of the peril in which the vessel is involved, and the probable difficulty, hazard and expense of attempting to deliver and repair her. When it appears that by proper exertions she might have been gotten off, and fully repaired at a moderate cost, the abandonment is void, and a partial loss only can be recovered; and to warrant the recovery of a total loss, it must be proved that the delivery of the vessel from peril was, upon reasonable grounds, judged to be

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impracticable, or not to be effected unless at an expense that would absorb all her value. In other words, it must be proved that a loss actually total was in the highest degree probable." *Fontaine v. Phoenix Insurance Co.*, 11 Johns. 295; *The Sarah Ann*, 2 Sum. 255.

The learned judge then continues to notice the fact, that in the United States we have departed widely from the sound doctrine of abandonment, by extending to the vessel that moiety rule which, in its original application, was confined to the goods, and which, thus confined, had itself no other foundation than the existing probability of the eventual total loss.

Judge STORY distinctly announces the rule, that, in case of stranding, the course that an owner uninsured, in the exercise of his best judgment, would have followed, furnishes the correct test of the right of the assured to abandon. *The Sarah Ann*, 2 Sum., *supra*.

Chancellor WALWORTH, in the case of *The American Ins. Co. v. Ogden*, 20 Wend. 302, holds the same doctrine; and there would seem to be no reason why the same test might not, with equal justice, be applied to every case in which an absolute right to abandon is not established by conclusive proof that the cost of repairs would have exceeded half the value.

The matter resolves itself into a question of fact, and must be determined by the jury from the evidence before them. By the application of these principles we cannot say that there was sufficient error in the first of the instructions given to justify a reversal. Although they are subject to some verbal criticism, yet they are substantially correct.

But the greater objection is made to the instructions given by the court, which, in effect, declared that if the defendant, on or about the 21st day of November, 1865, took possession of said boat with a view of raising and repairing her, and retained her till the 9th day of May, 1866, before offering to return her to the plaintiff, and if she never was repaired as required by the terms of the policy, and if the defendant and its agents knew that she was not so repaired, and it would have required a large additional sum of money to have been expended upon her to have put her in such repair, and if the written notice of abandonment given by plaintiff was served on the defendant on the 22d day of November, 1865, then the plaintiff was entitled to recover.

Another instruction in substance told the jury that if the repairs could have been reasonably made in a much shorter time, and if

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the boat was not repaired and tendered in a reasonable time, then the verdict should be for the plaintiff.

It seems to be well settled that the owners of a vessel are not bound to receive her from the underwriters if there is any material deficiency in her repairs. She must be made as good as she was before.

As to the return of the vessel within a reasonable time, the cases lay down a uniform rule. I have seen but one authority denying the proposition, and that is an adjudication of an inferior court.

In *Norton et al. v. Lexington Fire, Life and Marine Ins. Co.*, *supra*, it is held, that if, after an abandonment, the underwriter takes possession of the vessel, although he does it under protest, and gets her off and repairs her, no matter at how small or great a cost, it is an acceptance of the abandonment if he does not return her in a reasonable time. This principle is first announced in *Peel v. Suffolk Ins. Co.*, 7 Pick. 254, where it was explicitly adjudged that unless the repairs are made within a reasonable time, the insurer forfeits his right to return the vessel, and he must be considered as having accepted the abandonment. In this last case the reason for the rule is thus stated by PARKER, C. J.: "But the underwriter has his duties as well as his rights. If he took the vessel into his possession to repair her, he must do it as expeditiously as possible, in order that the voyage, if it be not completed, may not be destroyed. If he delay the repairs beyond a reasonable time, he forfeits his right to return the ship, and must be considered as taking her to himself under the offer to abandon. This principle cannot well be contested. Without it the underwriters may keep the assured entirely uncertain in regard to his rights and interests, and put his property in jeopardy. The right of the insurer to take into his custody the vessel of the assured without his consent, except under the abandonment, cannot exist without the correlative duty to keep her as short a time as possible under the circumstances in which she may be placed."

The same principle is again affirmed in *Reynolds v. Ocean Ins. Co.*, 1 Met. 160, and in the case between the same parties in 22 Pick. 191. We are also informed by the counsel for the respondent that the principle has recently been examined and approved in the supreme court of the United States, but the decision has not been published, and we have not yet seen it.

The only case we have seen that controverts the above author-

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ities, is *The Marine, Dock and Mut. Ins. Co. v. Goodman*, decided in the Mobile court of chancery, and published in 4 Am. Law Reg. 481. This case is not sufficient to overcome the great weight of authority arrayed against it, and its reasoning does not commend itself to our approbation. We see nothing objectionable in the action of the court in the matter of giving and refusing instructions on behalf of the appellant.

Our conclusion is that the judgment should be affirmed.

YOUNGBLOOD, appellant, v. VASTINE.

(46 Mo. 239.)

Conveyance — Recorded deed from heir has preference to an unrecorded deed from ancestor.

Where a person conveyed land by a deed, which was not recorded, and his heir, after his death, conveyed the same land, by a deed which was duly recorded, to an innocent purchaser, for value, *held*, that the recorded deed from the heir operated to divest the title of the grantee in the unrecorded deed from the ancestor.

SARAH G. WRIGHT, deceased, by herself and her trustee, on the 20th day of July, 1859, executed to E. J. Xaupi, in trust, to secure the payment of a promissory note of same date for \$3,700, given to Joseph Tuley, then living, a deed of certain real estate, her separate property, situate on the corner of Pine and Eighth streets, in St. Louis, which deed was not put upon record until the 19th of October, 1866. The said Joseph Tuley and Sarah G. Wright died in 1860 and 1861, and, on the 1st of October, 1865, D. Robert Barclay, as trustee for Mrs. Ann A. Macdonald, and with her funds, purchased said property of the heirs of said Sarah G. Wright, and received a warranty deed of the same, which was recorded April 28, 1866. It appears, from the evidence, that neither Barclay nor Mrs. Macdonald had any knowledge of the trust deed to Xaupi; that the records were examined before the purchase, to see if there were any incumbrances upon the property; that a full consideration was paid for it; that the estate of Mrs. Wright had been settled by the public administrator, and that all debts presented had been paid, but this note was not among them.

Garesche, for appellant.

Ewing & Holliday, for respondent.

BLISS, J. This suit was brought by the administrator of Tuley to foreclose his trust deed, and the contest arises in consequence of the failure on the part of Xaupi, to whom it was made, to place it upon record. Had the second deed been executed by Mrs. Wright while living, there would be no question that it would hold against the unrecorded deed. But, in some of the reported cases upon the subject, it is held that the same preference cannot be given to the second deed if made by the heirs of the first grantor. I confess I am not struck with the force of the reasoning upon which the distinction is made, for it is based upon the idea that the second deed is inoperative because nothing descended to the heirs, and hence they had nothing to convey. If that be so, it was because nothing was left in the ancestor that could descend; that his whole estate was divested by the first deed. If his whole estate was so divested, how could a second deed, if made by himself, be operative? Yet it is not disputed that such second deed would convey the estate, notwithstanding the first.

Yet the distinction is made by some of our most respectable courts, and it is apparently recognized by this court. In *Hill et al. v. Meeker*, 24 Conn. 211, the majority of the court held that the unrecorded deed from the ancestor so divested him of his title that his son and heir "took nothing by inheritance that he could convey or mortgage to a *bona fide* purchaser who had no knowledge of the deeds." The case is a much harder one than the one at bar, and the decision is based upon "a clear distinction between a purchaser from him (the ancestor) and one from his heir, Arza. In relation to a purchase from Arza, the difficulty is that he never had any title."

The same distinction was made in *Hancock v. Beverly's Heirs*, in 6 B. Monr. (Ky.) 531. The judge delivering the opinion acknowledges the question to be a doubtful and difficult one, and, in reasoning upon the subject, says: "It has always been held that a deed, though never recorded, is good between the parties and as to all the world, except creditors and innocent purchasers for value. The grantor in such deed can pass no title to his subsequent donee or devisee, and the law will pass none to his heir, because there was none in him, after his conveyance, to be passed, but in favor of a

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creditor or *bona fide* purchaser for value. Does the conveyance of the heir, or donee or devisee, who, as such, never had title, made to a purchaser for value, and without notice, operate to divest the title conveyed by the unrecorded deed, and, bringing it in another line of conveyances, vest it in subsequent purchasers?" This question the court, on the authority of *Ralls v. Graham*, 4 Monr. 120, answers in the negative.

Our own court, in *McCamant v. Patterson*, 39 Mo. 110, 111, seems to recognize the same doctrine, though, from the peculiarity of the title to the New Madrid grants, the question, in its general application, could not have arisen in that case.

Other authorities, however, equally respectable, have held, that the heir of the grantor in an unrecorded deed can convey a good title to an innocent purchaser for value. The supreme court of Pennsylvania, in *Powers v. McFarren*, 2 Serg. & Rawle, 44, in giving its opinion, remarks that "the purchaser for a valuable consideration, seeing no deed on record, had a right, under the sanction of the recording act, to take for granted that the whole estate had descended." The same question was raised in *McCulloch v. Eudaly*, 3 Yerg. (Tenn.) 346, and, in sustaining a deed from the heir, the following language is used by the court: "But it is contended that this (the saving to subsequent purchasers) only applies to cases where the purchase should be made from the same vendor by whom the prior deed was executed. It is true, the subsequent purchaser must hold under the same title; but whether he holds under the ancestor or heir, it can make no difference. The estate is thrown upon the heir, with all the rights the ancestor enjoyed, and subject to all incumbrances he had created on it."

The subject has also been considered in the state of Illinois, in *Kennedy v. Northrup*, 15 Ill. 148, and, after reviewing the authorities, the title from the heir was sustained. "After much reflection," says the judge who delivered the opinion, "I am satisfied that this is the true and proper construction of the statute. It meets the object designed to be accomplished by the law, and is within the reason which gave rise to the enactment. It was the object of the legislature to make patent the titles to real estate, that purchasers might know what titles they were acquiring. Where a deed is not recorded the title is apparently still in the grantor, and the law authorizes purchasers who are ignorant of the conveyance to deal with him as the real owner. In case of his death the heir becomes

the apparent owner of the legal title, and it is equally important and equally as just that the public may be allowed to deal with him as with the original grantor, if living."

There is no substantial difference between the statutes of the different states whose decisions I have quoted and our own. Different language is used, but the same result is aimed at, some expressly declaring unrecorded deeds to be void against subsequent purchasers, while ours negatively does the same thing by saying that no such instrument shall be valid except between the parties thereto, etc.

The discrepancy in the authorities has doubtless arisen in part from the endeavor to reconcile the statute with the subtleties of the old law of tenures, which treats a title as a substantial entity, and almost applies to it the powers of locomotion. The attempt involves the reasoner in contradictions, for in one breath it is said that the title passes by the deed to the grantee, and still so remains with the grantor; that in a contingency it may again pass from him to another grantee; but if the grantor dies it cannot descend like all his other titles, but goes back to the original grantee, with whom it has always remained.

It would be more rational to say that the law controls the manner in which rights of property are acquired, and that it will not favor any mode of acquirement that shall encourage fraud. Thus purchasers are required to spread upon record the evidence of their ownership, and if others suffer from their neglect the law will not recognize such ownership. Or, in using the language of the law of tenures, we might perhaps say that in a conveyance the absolute title rests with the grantor and his heirs in abeyance, to vest irrevocably only upon the record of the deed, and that it will vest in the first grantee, in condition to receive the grant, who shall so place it upon record.

The circuit court held, that the defendant's deed from the heirs of Mrs. Wright conveyed the whole estate, whereupon the plaintiff took a nonsuit, and his motion to set the same aside was overruled. In this the court committed no error, and, the other judges concurring, the judgment will be affirmed.

WOODS, appellant, v. HILDERBRAND.

(46 Mo. 284.)

Conveyance — alteration in by grantee — Mortgage.

An alteration in a deed of conveyance by a grantee after delivery does not affect the legal title or re-invest the same in the grantor, although a fraudulent and material change may disable the holder from bringing an action upon its covenants.

A mortgage does not convey the legal title, and a defendant in ejectment cannot set up a mortgage with which he is not connected as an outstanding title.

THE facts are stated in the opinion.

Ewing & Smith and *Burke & Howard*, for appellant.

Lay & Belch and *Owen & Wood*, for respondent.

BLISS, J. The plaintiff brings ejectment, and relies upon a sheriff's deed. He purchased at the sale sundry parcels of land, including the one in controversy, and, after receiving the deed, altered, as is claimed by defendant, the description of one of these parcels, but not the one he seeks to recover in this action. This change in the deed the court held to be fatal, and decided that the whole deed was thereby vitiated, and refused to consider it in passing upon the plaintiff's title. •

The defendant was also permitted to prove that the plaintiff, after receiving the deed, mortgaged the property to one Hinkle, and that the debt secured by the mortgage was overdue; but Hinkle had not foreclosed or sought to take possession under the mortgage, and defendant does not claim under him. The court, however, held it to be an outstanding title, of which the defendant could avail himself in this action.

In both these positions the court committed manifest error. It is a mistake to suppose that an alteration in a deed of conveyance, after delivery, operates to reconvey the title to the original grantor. A total destruction of the instrument will not have that effect, but the title remains in the grantee, and he may bring ejectment upon it. The title passed by the deed; it has performed its office, and its continued existence or integrity is not essential to the title, although a fraudulent and material change may disable the holder

from bringing an action upon its covenants. 1 Greenl. § 563; *Lewis v. Payn*, 8 Cow. 71; *Jackson v. Gould*, 7 Wend. 364; *Herrick v. Malin*, 22 Wend. 388; *Alexander v. Hickox*, 34 Mo. 496.

Whether a deed thus altered may be used in evidence of the real grant is, perhaps, not well settled. In *Withers v. Atkinson*, 1 Watts, 236, and in *Chesley v. Frost*, 1 N. H. 145, it is held that a fraudulent alteration of a conveyance by the grantee, in a material matter, utterly destroys it; and while the title thereby does not re-invest, the deed cannot be used by him for any purpose, either to sustain an action upon the covenants or as evidence of his title. But in *Doe v. Hirst*, 3 Stark, 60, and in *Jackson v. Gould*, 7 Wend. 364, an altered deed was allowed to be read in evidence to sustain the title created by it. We are not, however, called upon to give an opinion adverse to the doctrine of *Withers v. Atkinson*, *supra*; for in the case at bar the alteration, so far as the land in controversy is concerned, cannot be considered a material one. The plaintiff purchased at sheriff's sale several distinct parcels of land. They were all sold separately, and separate deeds might have been executed. The description of one of the parcels — from what motive does not appear — was changed by the grantee. Without considering what might be the effect of this change as to that parcel, we cannot see how it should affect the conveyance as to the others. As to them the alteration was immaterial, and the deed remains in full force, and should have been received as evidence of the plaintiff's title.

The ruling of the court upon the second point contradicts the long and well-settled doctrine as to the relation of the mortgagor and mortgagee before entry or foreclosure. "The modern doctrine is well established, that a mortgage is but a security for the payment of the debt or the discharge of the engagement for which it was originally given; and until the mortgagee enters for breach of the conditions, and, in many respects, until final foreclosure of the mortgage, the mortgagor continues the owner of the estate, and has a right to lease, sell, and, in every respect, to deal with the mortgaged premises as the owner, so long as he is permitted to remain in possession." *Kennett v. Plummer*, 28 Mo. 145. The case of *Meyer v. Campbell*, 12 Mo. 603, is relied upon as establishing the doctrine sustained by the court below; and such a position seems to be indicated by the court, though the question is not directly decided. The mortgagee himself, in possession after forfeiture, might doubtless set up his own title against that of the mortgagor

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(*McCormick v. Fitzmorris*, 39 Mo. 34), but, as against all the world besides, the mortgagor is the owner, and his title cannot be defeated by showing that the property is pledged to a third person for the payment of a debt. Hill, on Mortg. 162, § 15; *Raynor v. Wilson*, 6 Hill, 469; *Collins v. Torry*, 7 Johns. 278; *Jackson v. Pratt*, 10 id. 387; *Den v. Dimon*, 5 Halst. (N. J.) 156. If it was the intention of the court, in *Meyer v. Campbell*, to hold a contrary view, it is not clearly expressed; and, with the clear statement of the relation of the mortgagor and mortgagee in *Kennett v. Plummer*, and the universal holding in other states, we must unhesitatingly hold the doctrine in Missouri, as well as elsewhere, to be, that a defendant in ejectment cannot set up a mortgage with which he is not connected as an outstanding title. The fact that ejectment may be brought in Missouri by the mortgagee, while it will not lie in New York, does not invalidate the New York authorities upon the present question; for only the mortgagee himself may avail of his right, and it is of no consequence, so far as strangers are concerned, whether he have only the right to foreclose, or the right of ejectment as well.

The judgment of the district and circuit courts are reversed and the cause remanded for a new trial. The other judges concur.

HOLT v. BALDWIN, appellant.

(46 Mo. 205.)

Contracts—Liability of father on contracts of minor child.

The only ground upon which a father can be made liable for debts contracted by a minor son is that of an express or implied agency, and, in an action against the father to recover for a purchase made by the son, it is for the jury to determine whether such agency existed.

THE case is stated in the opinion.

Ewing & Smith, and *Burke & Howard*, for appellant.

J. W. Moore and *Lay & Belch*, for respondent.

CURRIER, J. The plaintiff sues to recover the purchase-money of a horse sold to the defendant's minor son. The petition shows, for substance, that a minor son of the defendant was engaged in the military service of the state, with his father's consent and approbation; that a horse was necessary for the use of the son in his employment; and that the son, under the authority of the father, purchased the horse in question, and took possession of him, and that his father, the defendant, subsequently ratified the transaction, and promised to pay the plaintiff the sum agreed upon as the purchase-money of the horse. These facts are somewhat scatteringly detailed in the petition, but they are sufficiently stated to show a good, and, at the same time, but one cause of action. The defendant's motion in arrest was therefore properly overruled.

The defendant's answer denies the principal matters alleged in the petition, and avers that the defendant furnished his son with every thing necessary to his circumstances and condition. Upon these issues a trial was had by jury.

At the instance of the plaintiff, the court instructed the jury as follows: "If the jury find from the evidence that the defendant, after the sale of said horse to his minor son, ratified the act and promised to pay for said horse, they will find for the plaintiff." Aside from an instruction in relation to the *quantum* of damages, this was the only instruction given in the case. It is radically defective. It assumes as a matter of law what should have been left to the jury to determine as a question of fact. The instruction assumes and declares the liability of the defendant upon the sole ground of his supposed subsequent ratification and promise, leaving out of view entirely the question of the son's agency in the transaction. If the defendant was liable at all, it was because he had authorized the purchase, either expressly or by implication. Whether there was any such express or implied authority was a matter for the jury to inquire into, and not for the court to assume as a matter of law. The fact of a subsequent ratification and promise was legitimate and persuasive evidence to go to the jury, from which they might have found that the purchase was made by the son as the defendant's agent, acting under authority, either expressed or implied. *Bron v. Deloach*, 28 Ga. 486.

"The moral obligation of a father to support his child does not make him legally liable to pay his child's debts; and to charge a father on his son's contracts, the same circumstances must be shown

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as to charge an uncle, a brother, or any third person. The son need not, however, have an express authority to bind his parent; for an authority may be implied under certain circumstances, and it is always a question for the jury whether the circumstances are sufficient for that purpose." Tyler on Inf. and Cov. 106, § 64. The general doctrine on this subject is that the "only ground upon which an infant can bind others by his contract is that of an express or implied agency." Id.

All the instructions asked by the defendant were refused by the court, and properly. The second instruction asked amounts to a demurrer to the petition; and the petition, as we have seen, was sufficient. Each of the remaining instructions leaves out of view the question of agency—the important and controlling element in the controversy—and were unwarranted for that reason.

The judgment, however, in consequence of the misdirection of the jury, as already explained, must be reversed, and the cause remanded. The other judges concur.

TABOR V. MISSOURI VALLEY RAILROAD COMPANY, appellant.

(46 Mo. 353.)

Railroad—Negligence.

The citizen who, on a public highway, approaches a railroad track and can neither see nor hear any indications of a moving train, is not chargeable with negligence in assuming that there is no car sufficiently near to make the crossing dangerous. He has a right to presume that in handling their cars the railroad companies will act with appropriate care, and that the usual signals of approach will be seasonably given.

THE facts are stated in the opinion.

Stringfellow & Doniphan, and Strong & Chandler, for appellant.

Pike & Hereford, for respondent.

WAGNER, J. Respondent brought his action against the appellant for damages in killing two horses belonging to him, and also

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for injury occasioned to his harness and wagon in being run over by a train on appellant's track. The accident occurred at a public crossing, and the evidence shows that about dark, on the 10th of September, 1867, the respondent was driving his team slowly across the track; that no trains were due at that hour, and that as the horses stepped upon the track the engine of a construction train struck them and killed them both, and did injury to the harness and wagon. It further appears that the train was running very fast, and that the parties in charge of it neither rang the bell nor sounded the whistle before approaching the crossing, as the statute requires.

The court gave three instructions for the respondent. The first told the jury that if they believed from the evidence that respondent sustained injury to his horses, wagon and harness, by reason of the negligence, carelessness, or mismanagement of the agents or employees of the appellant while running or managing a locomotive car or train at the crossing aforesaid, they should find for the respondent.

The second instructed the jury that it was the duty of the appellant to commence ringing the bell or blowing the whistle at a distance of eighty rods from the crossing of the public traveled road, and to keep ringing the bell or sounding the whistle until the locomotive and train had crossed the road, and that if it appeared from the evidence that at the time of the accident no bell was rung or whistle blown, the jury were at liberty to infer negligence or carelessness in the agents or employees of the road, and should find for the respondent, unless they should further find that he, on his part, was guilty of such negligence as contributed directly to produce or cause the injury.

The third instruction declared that if the jury should find that, owing to the train running out of the usual time of trains crossing the public traveled road, and that, owing to the location and construction of the crossing and the topography of the adjacent country, more than ordinary care should have been used by the persons in charge of the train in approaching the crossing, either by lessening the speed, or by any other means calculated to avert a collision, and no such care was taken or used, then the jury were authorized to infer negligence on the part of the appellant from such facts, and the respondent was entitled to recover, unless they also believed from the evidence that there was negligence on his part that contributed directly to produce the injury.

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Tabor v. Missouri Valley Railroad Company.

The appellant asked five instructions. The court gave the second and fifth, and refused the first, third and fourth. The second instruction, given at the instance of the appellant, explicitly stated that, although the jury might believe from the evidence that appellant or its agents committed the injury sued for, in consequence of negligence on their part, yet unless they further found from the evidence that respondent used such care to avoid the injury as a man of ordinary prudence would have used under similar circumstances, they should find for the appellant, unless they should find that the injury was willfully done.

The fifth instruction declared that, as to what was negligence in the respondent, the jury were to consider and judge, from all the circumstances in the case, whether a man having charge of a team of horses, and who was about to cross a railroad crossing in the night, above the level of the road he was crossing, where his view of the track and a coming train was intercepted until he got upon the crossing, was not in duty bound to stop and listen, and look up and down the track in both directions, before he ventured thereon; and that if they believed the respondent failed to do so, and that if he had done so he could have seen or heard the train coming, in time to have avoided the accident, then the jury should find there was negligence on his part; and if there was any negligence, or want of care or common prudence, on his part, which produced, or contributed to produce, or occasion the injury complained of, they should find for the appellant, unless they should believe from the evidence that appellant willfully produced the injury.

We see no error in the court in refusing the three rejected instructions.

The whole case turned upon a question of negligence, and that is purely a matter of fact to be found by the jury. The evidence is most conclusive that the agents in charge of the train were utterly derelict in their duty in ringing the bell or in sounding the whistle. Whether the respondent was guilty of such negligence as materially contributed to the injury, and would exonerate the appellant from responsibility, was submitted to the jury on the most favorable terms for the appellant. The instructions given for the respondent are wholly unobjectionable, and, when taken in connection with those given on the other side, leave the appellant no ground for complaint.

The whole case comes precisely within the principle adjudged in

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Kennayde v. Pacific Railroad Company, 45 Mo. 255, where we laid down the doctrine, that the citizen who, on a public highway, approaches a railroad track, and can neither see nor hear any indication of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous; that he has a right to presume that, in handling their cars, the railroad companies will act with appropriate care, and the usual signals of approach will be seasonably given, and that the managers of the train will be attentive and vigilant. A defendant cannot impute a want of vigilance to one injured by his act as negligence, if that very want of vigilance was the consequence of an omission of duty on the part of defendant.

Judgment affirmed. The other judges concur.

NOTE. — See *Hart v. Erie Railway Company*, 3 Alb. L. J. 312, wherein it was held, that a traveler on a public thoroughfare, crossing a railroad, has a right, on approaching the crossing, to expect that the usual warnings will be given of the approach of a train. He is not bound to assume that the railroad company will violate the law by omitting such precautions. He has a perfect right to act upon the assumption that they will obey the law, in determining the degree of caution which he should exercise in approaching the crossing. — REP.

GARNER, appellant, v. HUDGINS.

(46 Mo. 399.)

Statute of frauds — Oral promises to indemnify.

The plaintiff became surety on the note of an individual member of a firm, on the assurances of the firm that the money to be raised was for their use, and that they would pay it. The maker of the note became insolvent, and plaintiff paid the note, and brought suit against the remaining partner for the amount. *Held*, that the engagement of the firm was in effect a promise to indemnify against their own obligation, and was, therefore, not void under the statute of frauds.

THE case is stated in the opinion.

Hall & Oliver, for appellant.

Vories & Vories, for respondents.

BLISS, J. The petition recites that James T. Hudgins was director of the Farmers' Bank of Missouri, and that on the 28th of

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January, 1858, the firm of Wm. Hudgins & Co., composed of defendants and said James T. Hudgins, desired to procure a loan of \$3,700; and for reasons set forth the said firm, by the name of, and through the position of, said James T., procured said loan and used it in the firm business, the said James T. executing his note at six months, with sureties for said sum; and it being understood, when said note was executed, that its proceeds were for the use of the firm, and that the firm was to be liable for its payment. The note was renewed from time to time until its last renewal, on the 25th of December, 1862, with the same understanding and agreement, the said firm paying the interest at each renewal. The petition charges that, at said date, defendant Bayliss, then transacting the business of the firm, acknowledged that said debt was obligatory upon the firm, and promised that the firm should pay it, and that the plaintiff became surety upon said last renewal at the special instance and request of said firm, and, specially, that said Bayliss, acting for the firm, represented to and promised the plaintiff, at the time of said last renewal, that it was made to give said firm of Wm. Hudgins & Co. longer time to pay the debt; that the note was given for their benefit, and that they would pay it; and that the plaintiff, relying upon and induced by such representations and assurances, signed said note as surety. The petition further shows that the note was protested for non-payment; that the said firm of William Hudgins & Co. failed to pay the same and protect the plaintiff as their surety; that the said James T. Hudgins is dead, and his estate is insolvent and wholly unable to pay the same; and that the plaintiff, on the 20th of November, 1867, as such surety, paid upon the note the sum of \$600, which he seeks to recover back in this action. To this petition a demurrer was filed, which was sustained by the circuit and district courts.

This court has already decided, in *Farmers' Bank of Missouri v. Bayliss et al.*, 35 Mo. 428, and 41 id. 274, that this firm of Wm. Hudgins & Co. is not liable to the said bank, either upon this note or for the money advanced upon it; and defendants now insist that, if not so liable to the bank that discounted the note, they cannot be held by a surety who has been compelled to pay it.

In the cases referred to, the court decided that there was no privity of contract between the bank and the said firm; that in discounting the note no credit was given to the firm, but only to the parties to the note; and that the fact that the money was bor-

rowed upon the credit of the note for the use of the firm, only created a creditor and debtor relation between the maker of the note and the firm. Certain remarks of the judge who delivered the opinion in the last case seem to have been relied upon by the courts below in sustaining the demurrer. The judge says, on page 288: "If the indorsers on the note are obliged to pay it, they have their recourse upon the maker, for whom they are sureties, and he may have his account against his firm, to whose use he has applied the money." This is undoubtedly true, but it is not necessarily true that the indorsers' sureties have no other remedy against the insolvent maker.

In *Higgins v. Dellinger*, 22 Mo. 397, where one borrowed money to remit to his brother, and gave a bond, with the plaintiff as surety, who afterward paid the bond, the court, without any direct evidence of the fact, but in furtherance of justice, held the person who borrowed the money to have been the agent of the one to whom it was remitted, and hence that the latter was holden to the surety; but Judge LEONARD, in giving the opinion, remarked: "If, however, S. D. borrowed the money for himself, either to pay a debt he owed his brother or to make a loan to him, then F. (the brother) was not liable to the plaintiff, but to his brother's estate." This case, then, to which we are referred by the present plaintiff, is not in point, for, as we have seen, this court has twice decided that the note in question was not the note of Wm. Hudgins & Co., but of James T. Hudgins, which is inconsistent with the idea that he executed it as their agent. Hence, if they are holden at all, it must be upon some other principle.

The engagement of defendants set out in the petition, so far as the plaintiff is concerned, has the effect of and is in the nature of a promise to indemnify; and defendants deny their obligation because it was made without consideration and was not in writing. Its consideration is apparent, when we consider that the plaintiff was induced by it to become a party to the note; but the facts that the note was a debt of James Hudgins, and the promise was not in writing, would seem, at first sight, to bring it within the statute of frauds.

It has been sometimes held that a promise to indemnify did not come within the statute, but it seems to be now settled by the better authorities that where the promise is collateral, merely, the promisor having no interest in the liability guaranteed against, and being

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under no obligations to pay it, it is not obligatory unless in writing. See *Brown on Frauds*, §§ 168-171, and cases cited. But the promise to indemnify is only embraced by the statute when it is to pay the debt of another, and hence an indemnity against one's own obligation or liability does not come within it. See cases cited in note to § 188, *Brown on Frauds*.

The remark of this court in *Howard v. Coshov*, 33 Mo. 118, that the statute applies only to promises made to the creditor, is, in general, correct, but cannot apply to promises of indemnity.

Unless, then, in the case at bar, the defendants were under some obligation in regard to the subject-matter of this note, the agreement to pay it as an inducement to the action of the plaintiff in signing it cannot be enforced as an indemnity. It is unnecessary to consider what precisely in all cases that obligation should be, but I have no hesitation in holding that in the present case the obligation of the defendants was sufficient to hold them to their undertaking.

This court has not decided, as seems to be assumed, that the defendants are not liable for this debt, but only that they were not parties to the note, and are not liable to the bank. Their liability to James T. Hudgins, who obtained the money for them, is expressly recognized in the cases cited. It was his duty to pay the note, and it was the duty of the firm to pay him. The obligation upon the defendants was the same, and it does not matter to them whether they paid it to one or the other. The bank might not be able to compel them to pay it, because there was no contract between them; but James Hudgins could; and being so obligated, and in order to extend their credit, they induced the plaintiff to become surety upon the last renewal, by admitting that the money was obtained for their use, that they were bound to pay the note, and by agreeing to pay it at maturity. They thereby substantially undertook to indemnify for a liability for their own debt as well as that of the maker of the note. Most of the cases reported involving the application of the statute are, where the promise is direct, to pay the debt of another, and that promise is sought to be enforced by the creditor. In those cases the rule has generally been, that if the engagement be only collateral to the original undertaking, the promisor becoming but a surety to the principal debtor, it comes within the statute and must be in writing. But even then, if the promise be to pay a debt which the promisor is already under obligation to discharge, or when the

promise is in effect to pay his own debt, although that of a third person be incidentally guaranteed, it does not come within the statute (*Johnson v. Gilbert*, 4 Hill, 178; *Brown v. Curtis*, 2 N. Y. 225); and upon this principle the assignor of a promissory note is held by his guaranty, though not complying with the forms of the statute, because, upon assigning the note for value, he becomes a conditional debtor to the assignee, and thus guarantees his own debt. And the principle is carried still further. After commenting upon a number of decisions, the supreme court of Massachusetts, in *Nelson v. Boynton*, 3 Met. 402, states it thus broadly, and says that "cases are not considered as coming within the statute when the party promising has for his object a benefit he did not before enjoy, accruing immediately to himself; but when the object of the promise is to obtain a release of the person or property of the debtor, or other forbearance or benefit to him, it is within the statute."

The principle thus recognized should apply with more force to cases of indemnity, which usually are not, even in form, promises to pay the debt of another, but to save harmless the promisee. Thus, in *Harrison v. Sawtell*, 10 Johns. 242, the defendant, being bound to protect a third person, obtained special bail for him, and verbally promised to indemnify the person becoming bail. The court held that the statute of frauds had nothing to do with it, for the reason that the plaintiff had become bail for a third person whom the defendant was bound to protect and save harmless in the suit.

Defendants' counsel seem to assume in argument that the money thus borrowed by James T. Hudgins for the use of the firm was to furnish his share of the capital of the firm, or to pay some debt due them. But this idea is negatived by the averments of the petition.

The defendants acknowledged the indebtedness to be theirs, and agreed to pay it; and that agreement being made with the plaintiff, who is not a partner, as an inducement to his action, becomes, so far as he suffers by that action, a debt of the firm.

The judgment of the district and circuit courts are reversed and the cause remanded. The other judges concur.

Bundy v. Hart.

BUNDY v. HART, appellant.

(46 Mo. 400.)

Slander — Words charging acts to have been done in another state — Variance.

In an action of slander, if the alleged slanderous words charge an act to have been done in another state or country, which is not a crime by the common law, in order to make them actionable the pleading should show and the evidence establish its criminality by the laws of such state or country.

In an action of slander, the words charged and the words proved must be substantially the same; that they both convey the same idea, will not be sufficient to sustain the action.

THE facts are stated in the opinion.

Harrington & Cover and Barrow & Millan, for appellant.

Porter, Williams & Eberman, for respondent.

BLISS, J. The plaintiff prosecutes for slander, charging it as follows: "Plaintiff states that on or about the first day of December, 1866, defendant spoke the following false and slanderous words concerning the plaintiff: 'That he had to leave Indiana for burning a barn,' thereby meaning and intending to charge that plaintiff had been guilty of the crime of arson, and was so understood by the bystanders," etc. Defendant denied the speaking the words, and, upon the trial and by motion in arrest, claimed that the words were not actionable without the allegation that, by the laws of Indiana, burning a barn could be arson. That the words spoken, in order to be actionable in themselves, must import a crime involving disgraceful or corporal punishment, is not denied, and the elucidation of the law by Judge RICHARDSON, in *Birch v. Benton*, 26 Mo. 163, leaves nothing to be said upon that point.

We can only assume that an act is criminal in another state or county where the court cannot take notice of its laws, by proof of the fact, or by reference to the general or common law; and hence if the words charge an act to be done in another jurisdiction, which is not a crime by the common law, in order to make them actionable the petition should show and the evidence establish its criminality by the laws of such state or country. If the offense charged be

a crime by the general law involving the punishment spoken of, as a charge of administering poison (33 Vt. 136), or of larceny (4 Blackf. 460), or murder (3 Wis. 709), the words are actionable without any allegations concerning the laws of the state or country where the offense is charged to have been committed. The court will assume that such offenses are universally punishable in a criminal court (*Johnson v. Dicken*, 25 Mo. 580); but it is otherwise where the act is not subject to criminal punishment at common law. Thus, it was held in *Barkley v. Thompson*, 2 Pa. 148, that a charge of adultery committed in New York is not actionable in Pennsylvania without showing it to have been punishable in New York as a crime; and all the authorities go to the same extent. *Wall v. Haskins*, 5 Ired. 177; Townsh. Sland., § 160, and cases cited.

I find no difference in the authorities in regard to the necessity of proving the criminality of the act charged, but they are not equally clear upon the question of pleading. In *Shipp v. McCraw*, 3 Murphy (N. C.), 463, the defendant had charged the plaintiff with stealing a note in Virginia; and it having been proved that the act was larceny by the laws of Virginia, the majority of the court sustained the judgment obtained by the plaintiff—HALL, J., dissenting upon the ground that the declaration had not set forth "whether or not the stealing of a note in that state was an offense." But the question of pleadings was not noticed in the opinion of the majority, and they must either have ignored the fundamental principle of all pleading, that the material facts must be set out, or treated the declaration as sufficient after verdict; for it is clear, that, unless it was a crime in Virginia to steal a note, there was no slander, and that it was, was a fact to be alleged and proved.

The case of *Barham v. Nethersol*, 4 Coke (S. C.), 20, and Yelv. 22, is often cited. No inducement was set out, and the words charged were: "T. Barham (the plaintiff) hath burnt my barn" (meaning my barn at that time full of corn). Judgment was arrested, because burning a barn was a trespass only, although it was a felony to burn it filled with corn. Had the extrinsic fact that the barn was full of corn been first alleged by way of "inducement," a foundation would have been laid in the pleading for inferring the meaning of the words; and it would have been good. The doctrine of this decision has been followed in all the leading cases, both in England and the United States, and this court has uniformly

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recognized it. See Townsh. Sland., §§ 159, 336, 337, and cases cited in the notes; also *Palmer v. Hunter*, 8 Mo. 512; *Curry v. Collins*, 37 id. 324. Indeed, I have never heard the general principle doubted, that where words are charged that are not actionable without a knowledge of some extrinsic fact, it is necessary to set forth that fact by way of preliminary averment. Unless it is done, the petition makes no case, and I cannot see why the existence of the foreign statute necessary to give character to the words is not a fact merely, without which the words are legally innocent. The liability of defendant is a logical conclusion from the facts charged, and there is no liability on paper if a material fact is omitted to be charged.

And it is not sufficient that the extrinsic facts appear by the innuendo, for it is not the office of the innuendo to make averments, but to apply the words or explain their meaning. *Van Vechten v. Hopkins*, 5 Johns. 211. Averments must be proved. Innuendos are used to so connect the words charged with the averments, or show their meaning, as to make the petition a logical and complete statement of the plaintiff's case. "The question which an innuendo raises is in all cases a question not of fact, but of logic." *Fry v. Bennett*, 5 Sandf. (N. Y.) 65.

The code dispenses with all special averments showing the application to the plaintiff of the defamatory matter, but with no other, and, with this exception, all the rules applicable to the substance of the petition are in full force. *Fry v. Bennett*, *supra*.

Applying these principles to the case at bar, it will be seen that the petition is defective in not showing that burning a barn, without the circumstances that make it arson at common law, is made arson by the laws of Indiana. It is not an offense at common law unless the barn was connected with a dwelling-house or was filled with corn. 4 Blackst. 221. The pleader attempts to supply the want of a proper averment by an innuendo, which cannot be done. Its province, as we have seen, is to explain the meaning of the words, and the meaning ascribed to them cannot be true unless the act charged was arson by the laws of Indiana, of which we are unadvised. Had the words been "he had to leave Indiana for burning a dwelling-house"—meaning that he there feloniously burned a dwelling-house of another, or meaning that he was there guilty of arson—no extrinsic averment would

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have been necessary; for the words themselves, if the true meaning were given, would be actionable as charging a crime *per se*.

It may be said that the courts of each state should assume all acts to be criminal in other states that are made so by the statutes of their own state, but this would be an assumption, not only contrary to the traditions and practice of courts, but contrary also to the known fact; and if it be also said that burning a barn is a crime of such moral turpitude that we should assume it to be a punishable offense, that must depend upon circumstances. If the charge involve such a burning as to make it by our statute arson in the first or second degree, the remark would apply, for that would be a crime at common law, and no foreign statute need be alleged or proved. But many of our western barns are in the open field and of trifling value, some being built of poles and straw, and their destruction would involve less of the moral elements of crime than some mere trespasses. No such aggravated meaning was sought to be given to the words charged in the petition, and the plaintiff relied entirely upon the Indiana statute, which he was permitted to prove without having pleaded it.

The suggestion of counsel that the petition is good after verdict is not valid, for the reason, if there were no other, that defendant objected to it in every stage of the case, and excepted to the action of the court in sustaining it.

The court also committed error in refusing to give the following instruction to the jury: "The court instructs the jury that if they believe from the evidence that defendant did not speak the words charged, to-wit: 'He (Bundy) had to leave Indiana for burning a barn,' but that he spoke the following other words, to-wit: 'I think my character is about as good as Bundy's; I hadn't to leave Indiana for burning a barn,' these words will not support the charge, and they will find for defendant." This instruction should have been given, for the words supposed do not support the petition. The words proved must be substantially the same words charged in the petition, not different words of the same import. More words may be and usually are proved than are laid, but those laid must be substantially covered by the proof. The law upon this subject is well stated by Judge SCOTT in *Berry v. Dryden*, 7 Mo. 324, and is affirmed and enlarged upon in *Birch v. Benton*, *supra*. "Although the words proved," says Judge S., "are equivalent to the words charged in the decla-

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ration, yet, not being the same in substance, an action cannot be maintained; and although the same idea is conveyed in the words charged and those proved, yet if they are not substantially the same words, though they contain the same charge, but in different phraseology, the plaintiff is not entitled to recover." Proof of words spoken in the second person will not sustain a petition charging the speaking to have been in the third person. *McConnell v. McCoy*, 7 Serg. & R. 223. In an old case the words "she is as very a thief as any that robbeth," etc., were held not to be supported by proof of the words "she is a worse thief than any that robbeth," etc. *Ratcliff v. Shubley*, Cro. Eliz. 224. The whole subject of variance between words laid and proved is discussed in Starkie on Slander, etc., pp. 369-376, and differences much slighter than between those in the petition and supposed in the instruction refused are held to be fatal.

The judgment is reversed and the cause remanded. The other judges concur.

CARSON v. HUNTER, appellant.

(46 Mo. 467.)

Statutes of limitation — Consideration — Slaves.

In an action on a promissory note given in Arkansas, the defendant alleged that the action was barred by the statute of limitation of that state; *held*, that the *lex fori* and not the *lex loci contractus* was to govern.

The defendant further alleged that the note was given for slaves taken by the plaintiff from Missouri into Arkansas, after the proclamation declaring that state in insurrection: *held*, that the transaction was in violation of law, and that the note could not, therefore, be collected.

BLISS, J., The plaintiff brought his action upon a promissory note given him by defendant at Pocahontas, Arkansas, November 12, 1861, to which the maker sets up two defenses: first, the statute of limitations of Arkansas; second, illegality of consideration.

This suit was brought in Missouri, and we have nothing to do with the Arkansas act of limitation. The *lex fori* decides all questions pertaining to the remedy, and the statute given in evidence does not vary substantially from our own, except that the time is

fixed at five instead of ten years. It is too well settled now to admit of question, that acts of limitation, unless they expressly discharge the debt, go to the remedy merely, and that none can be pleaded except those in force where the suit is brought. *King v. Lane*, 7 Mo. 241; *Sto. Confl. Laws*, § 577, *et seq.*, and all the authorities.

It is claimed, and not without show of reason, that where, as in the case at bar, the term fixed by the statute had already expired before the pleader left the state in which the contract was made, it should be deemed to have been discharged, and that it cannot be revived by removal to another state. Judge STORY considers this point at length in *Le Roy v. Crowninshield*, 2 Mason, 151, and thinks the position founded in reason, although in deference to authority he decides against it. In *Bulger v. Roach*, 11 Pick. 36, the question came before the supreme court of Massachusetts, and the court denied the force of the distinction involved in it, and held that the general doctrine applied to "a case where both parties were subject to the jurisdiction of a foreign state, when the bar arising from its statutes of limitation attached." Justice SHAW gives as a reason for making no distinction between cases where the statutory period had elapsed when the party left the foreign jurisdiction, and where it was still running, the fact that the time having begun to run would continue until completed, notwithstanding the parties might leave the jurisdiction. This is a good reason, though somewhat technical; but a better one, it seems to me, is suggested by the policy that dictates, and by the character of, acts of limitation. They are properly called statutes of repose. The state fulfills its duty to the citizen if a reasonable time is given to apply for the redress of wrongs. More than that encourages strife, by reviving controversies that had been suffered to sleep, and reviving them, too, after it may have become difficult to understand their true character. Each state must necessarily decide for itself what time is reasonable.

It is sometimes said that these acts raise an imperative presumption of payment or satisfaction; and if this were their theory, and if this presumption once attached, I do not see how it could be avoided by a change of domicil; and, besides, it would seem in such case that the limitation could be shown in support of a plea of payment, etc. But when we consider these acts as declarations of the law-making power, fixing the period of time in which courts shall be open for the redress of grievances, it seems per-

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fectly clear that the term prescribed by one state has no control whatever over that which may be fixed by another. If the state of Arkansas says that it will furnish and support tribunals to litigate claims growing out of bills and notes, five years and no more after the cause of action has accrued, it is no reason why Missouri may not determine upon a longer or shorter period. These acts of limitation do not assume that in a certain period liabilities will have been satisfied in fact, but they fix a reasonable period in which the law will aid parties in enforcing satisfaction; and if Missouri grants a longer time than Arkansas, it does not thereby revive a satisfied claim, but simply gives claimants greater opportunities to compel a debtor to do what he should have done without compulsion. This theory in regard to limitations to actions upon contracts was adopted by this court in *Stephens v. The St. Louis National Bank*, 43 Mo. 385, and effectually repels the idea that payment is to be presumed from the lapse of the period provided in the Arkansas statutes.

We are referred by counsel to *Baker v. Stonebreaker*, 36 Mo. 338, in which a certain act in force in Maryland was held not to be a mere act of limitation, but that it absolutely extinguished the cause of action. "The doctrine is well established," says the court, "that when an act of this kind operated to extinguish the contract or debt itself, the case no longer falls within the law of limitations on the remedy merely. In such case, when the debt or judgment is sued on in another state, the *lex loci contractus*, and not the *lex fori*, is to govern." But the limitation pleaded in the case at bar is not an abrogation or extinguishment of the contract. It provides that suits shall be brought within a certain period, "and not after"—the latter phrase not varying, though making a little more emphatic, the general provision.

The second defense sets out, though imperfectly, an insufficient consideration, inasmuch as the note was given for slaves taken by the plaintiff from Missouri to Arkansas during the war, and sold to defendant. Congress, by the act of July 13, 1861, authorized the president to declare any state or part thereof to be in a state of insurrection, and forbade all commercial intercourse between the same and their citizens and the citizens of the rest of the United States. Under this act, the president of the United States, on the 16th of August, 1861, declared certain states, including Arkansas, to be in insurrection, and from that period all trade between citizens

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of Missouri and those of Arkansas became unlawful, unless by special license. If the plaintiff, after that time, took negroes, or any thing else which was the subject of barter and sale, into Arkansas, and sold them, and received the note now in suit in payment, the transaction was in violation of law, and the note cannot be collected.

The supreme court of the United States, in *The Ouachita Cotton*, 6 Wall. 521, considered the effect of this act and proclamation, and pronounced the various purchases then under consideration, and made in contravention of them, to have been unlawful, and operating no transfer of property; and in *The Reform*, 3 id. 632, and *The Sea Lion*, 5 id. 647, special license from the president was held essential to validate such trade.

This disability would naturally spring from the fact of war, for the absolute prohibition of commercial intercourse between the subjects of belligerent states, without license from the sovereign power, is one of its incidents. Says KENT, in *Griswold v. Waddington*, 1 Johns. 483: "The law has put the sting of disability into every kind of voluntary communication and contact with an enemy which is made without the special permission of the government." Wheaton, in his *Elements of International Law*, on pages 391, 392, considers the subject at some length, and, by various citations from English and continental, as well as American, authorities, shows the rule prohibiting commercial intercourse, without license, between citizens or subjects of hostile states, to be universal and inflexible. Applying it to contracts, in § 15, p. 392, he says: "It follows, as a corollary from the principle interdicting all commercial and other pacific intercourse with the public enemy, that every species of private contract made with his subjects during the war is unlawful. The rule thus declared is applicable to insurance on an enemy's property and trade; to the drawing and negotiating of bills of exchange between the subjects of the powers at war; to the remission of funds, in money or bills, to the enemy's country," etc.

During the late civil war, many slaves were taken to the states in insurrection, and their whole labor became thereby directed to the creation of such supplies as alone could enable the enemy to keep the field. To hold such intercourse lawful, and enforce contracts made in prosecuting it would suppose that government could sanction its own destruction, and would present the spectacle of a coun-

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try lawfully fighting those whom its subjects were lawfully feeding. The law tolerates no such absurdity.

The record shows that the circuit court must have held that the note in suit was barred by the Arkansas statute of limitations, and, for that reason, the district court did right in reversing its judgment. It does not appear that the facts involved in the other defense were passed upon, and, until that was done, the district court should not have rendered judgment upon the demand. Its judgment of reversal is affirmed, but that rendered upon the note is reversed, and the cause remanded to the circuit court for a new trial, with leave to amend the answer. The other judges concur.

BISHOP V. SCHNEIDER, appellant.

(46 Mo. 472.)

Conveyance—recording of—failure to index—certificate of acknowledgment.

A deed filed for record in a recorder's office, and recorded, is notice to subsequent purchasers, notwithstanding the failure of the officer to index it. When it is provided by statute that, in order to the registration or recording of a conveyance, the deed shall be acknowledged before some officer, and a certificate thereof entered upon the deed, if the deed is entered without the prescribed acknowledgment the recording or registration will not be constructive notice to any one.

THE case is stated in the opinion.

H. F. Ahlvers, for plaintiff in error.

Thomas & Thomas, for defendant in error.

WAGNER, J. In this case the record shows that one Reynolds, on the 2d day of January, 1860, executed to Robert E. Warren his promissory note for \$852.90, and that, subsequently, to secure the payment of the same, he made and delivered to Warren a mortgage on certain real estate lying in Jefferson county. The mortgage was duly filed for record in the recorder's office of Jefferson county, and recorded, but no index thereof was made. On the 1st of May, 1869, Warren assigned the note and mortgage to Bishop, the plaintiff in this suit.

Reynolds, by deed dated March 17, 1864, and properly recorded.

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conveyed what interest he possessed in the land to one Ackerman, and Ackerman conveyed the same by deed of trust to secure a certain indebtedness. The trustee, in pursuance of the trust, advertised and sold the land on the 14th day of December, 1867, and Schneider, the defendant, became the purchaser. It is not shown that Schneider had any other notice of the mortgage incumbrance than what was imparted by the record.

The mortgage was defectively acknowledged, and, on this proceeding being instituted for foreclosure, the suit was resisted mainly on two grounds: first, that the record imparted no notice of the contents of the mortgage; secondly, that the instrument was not recorded within the meaning of the statute.

The circuit court overruled the objections of the defendant and gave judgment for the plaintiff. This judgment was affirmed in the district court, and the defendant has sued out his writ of error and brought the cause here for review.

I will first examine the point in reference to the effect of the failure of the clerk to properly index the mortgage. It is contended, that, because the mortgage was not indexed by the recorder, it was not recorded according to law, and therefore failed to give even constructive notice to a subsequent purchaser. This necessarily raises the question whether the index is a part of the record, and whether, when the officer has failed to comply with his duty in this regard, although the grantee has done every thing that was required of him by law, the recording shall be deemed a nullity and of no avail. In the case here the mortgage was duly filed and regularly recorded, and a certificate indorsed on the instrument stating that fact. The grantee then relied on the assurance that the recorder had discharged his whole duty, and that he would be protected in his rights. But, by the neglect and carelessness of that officer, no index to the deed was made, as the statute directs, and hence persons searching the records would be apt to be misled as to any existing incumbrance. Upon whom the primary loss must fall in such a case depends upon the construction of the statute in reference to the registration of conveyances.

All these proceedings were had while the statutes of 1855 were in force, though the same provisions are to be found in the subsequent revision of 1865.

By section 13, p. 1314, R. C. 1855, it is provided that the recorder shall record, without delay, every deed, mortgage, conveyance, deed

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of trust, bond, commission, or other writing delivered to him for record, with the acknowledgment, proofs, and certificates written on or under the same, with the plats, surveys, schedules, and other papers therein referred to and thereto annexed, in order of time, when the same shall have been delivered for record, by writing them, word for word, in a fair hand, noting at the foot of such records all interlineations and erasures and words visibly written on erasures, and noting at the foot of the record the day of the month and year when the instrument so recorded was delivered to him or brought to his office for record; and the same shall be considered as recorded from the time it was so delivered.

It is provided by section 14 that the recorder shall certify, on or under such deed, mortgage, conveyance, deed of trust, bond, commission, or other instrument so recorded, the day, month, and year when he received it, and the book and page or pages of the book in which it is recorded; and, when recorded, deliver it to the party or his order.

Section 15 declares that the recorder shall keep in his office a well-bound book, and make and enter therein an index, direct and inverted, to all the books of record wherein deeds, mortgages, or other writing, concerning real estate or deeds of trust, are recorded, distinguishing the books and pages in which every such deed or writing is recorded.

Section 16 prescribes that the index shall contain, in alphabetical order, the names of the several grantors and grantees, etc. Sections 17 and 18, in like manner, require that the clerk shall provide books for indexing marriage contracts and commissions and office bonds. Section 19 imposes a penalty on the recorder for refusing or neglecting to perform his duty, and further says that if he neglects or refuses to provide and keep in his office such an index as is required by the act, he shall pay to the party aggrieved double the damages which may be occasioned thereby, to be recovered by civil action on the official bond of the recorder. The grantee has no control over the official acts of the recorder, and when he has delivered to the officer his deed, he has performed all the duty within his power; and when the deed is copied on the record, the statute says it shall be considered as recorded from the time it was delivered. The subsequent sections are distinct and independent provisions respecting indexing, and do not form a part of the law as to recording. They impose a duty on the officer, and denounce a

liability for a neglect or refusal to obey that duty, but they do not make what has previously been done void.

In the case of *Terrell et al. v. Andrew County*, 44 Mo. 309, the mortgage was given for four hundred dollars, and the recorder, in recording the same, by mistake inserted two hundred dollars in the record instead of four hundred dollars, showing an incumbrance for the former instead of for the latter sum; and it was decided that notice of the contents of instruments was imparted after filing only where they were correctly spread upon the record, and not otherwise. And in conformity with that view the subsequent purchaser had notice of a subsisting incumbrance for two hundred dollars, and no more.

So, in *Beckman v. Frost*, 18 Johns. 544, the registry of a mortgage of \$3,000 as a mortgage of \$300 was considered as notice only of an incumbrance for the sum stated in the record. In such cases the purchaser may be wholly free from fault or negligence. He may deliver his deed to the proper officer, and it may be returned to him as recorded, but, through accident or design, it is not truly recorded. Subsequent purchasers or creditors, having no other means of knowing of the contents of the deed than by resorting to the records, cannot be considered as having notice of any other conveyance than such as appeared on the record.

Where a town clerk copied a deed delivered to him for record on a book which had ceased to be a book for recording for a number of years, and, for the purpose of concealment and fraud, did not insert the names in the index or alphabet, it was held that the deed was not recorded, and was no notice to after-purchasers. *Sawyer v. Adams*, 8 Vt. 172.

In the case just mentioned, the mortgage, which was made by the clerk as grantor, was copied on the back leaf of a volume of records in which there had been no deeds recorded for upward of twelve years, and a number of new books had been used for the purpose of recording. It was a plain and palpable fraud, as the book was not at that time a book used for recording.

Under a statute essentially similar to ours in all its provisions and regulations, it was held that where the mortgagee left his mortgage with the clerk for record, and the clerk recorded the same at length, and so certified upon the mortgage, but made no index of the said mortgage, that the mortgage was properly recorded within the meaning of the statute, and that the index constituted no part of

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the record, and that the mortgage became an incumbrance upon the land from the time it was transcribed upon the record. *Curtis v. Lyman*, 24 Vt. 338.

The result of the doctrine insisted upon by the counsel for the plaintiff in error is to superadd or provide an additional requisite to the record of conveyances; in other words, no record is to be considered of any validity till an index is duly made out and entered. But no such language is, however, found in the statute, nor do we think any intention to ingraft such additional requisite upon a deed can be fairly implied from the language used.

The general nature, object and scope of the whole act, taken together, is to point out the duty of the clerk, not only in the making of a proper record of conveyances, but also in furnishing facilities for their discovery, examination and use, by all persons interested in them; and to secure the due performance of these duties the clerk is made liable to the party injured for the neglect of them. The index, which it is the duty of the clerk to make out and preserve in a book for that purpose, seems to be one of the facilities to be used in making search for the record, but not a part of the record itself.

It is his duty to have an index and to enter upon it a proper reference to every record of a conveyance, and for any neglect to do so he is liable to the party aggrieved for double the amount of damages sustained. But it is not certain that any one will be injured by the neglect, and therefore the record itself should not be held void. The purchaser may take his deed, relying solely upon the representations or covenants of his grantor, without desiring to examine the records. An index or the want of it would obviously be of no importance to him. So if, without making any search, or causing any to be made, a person should rely alone upon the representations of the clerk that the title was clear, and these representations should be knowingly false, could it with reasonable propriety and fairness be said that he was injured by want of an index? Yet in these cases, if the argument advanced be correct, though no one is injured by the failure of the clerk to perform his duty as to indexing, and though the purchaser has had his deed correctly transcribed and spread upon the record, still the recording should be held void.

In my opinion, the proper office of the index is what its name imports—to point to the record—but that it forms and consti-

tutes no part of the record. The statute states, without reserve or qualification, that when an instrument is filed with the recorder and transcribed on the record, it shall be considered as recorded from the time it was delivered. From that time forth it is constructive notice of what was actually copied. A subsequent section, for the purpose of facilitating research, besides recording, devolves a separate, distinct, and independent duty upon the recorder, and in the event of non-compliance with that duty the party injured has his redress. The purchaser or grantee, when he has delivered his deed, and seen that it was correctly copied, has done all the law requires of him for his protection; and if any other person is injured by the fault of the recorder in not making the proper index, he must pursue his remedy against that officer for the injury.

Assuming, then, that the recording of the mortgage was good under the law, the next inquiry is whether it was such an instrument as would impart constructive notice by registration. It purported to convey certain lands lying in Jefferson county, and the acknowledgment was taken before a justice of the peace in Franklin county. The statute (R. C. 1855, p. 358, § 17) provides that the proof or acknowledgment of every conveyance or instrument in writing, affecting any real estate in law or equity, shall be taken by some one of the following courts or officers: first, if acknowledged or proved within this state, by some court having a seal, or some judge, justice, or clerk thereof, notary public, or some justice of the peace of the county in which the real estate conveyed or affected is situated, etc.

Section 40 of the same act, relating to conveyances, declares that every instrument in writing that conveys any real estate, or whereby any real estate may be affected in law or equity, proved or acknowledged and certified in the manner before prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated. And section 41 provides that every such instrument in writing, certified and recorded in the manner before prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice.

Where it is provided by the statute that, in order to the registration or recording of a conveyance, the deed shall be acknowledged

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before some officer, and a certificate thereof entered upon the deed, if the deed is recorded without the prescribed acknowledgment, the recording or registration will not be constructive notice to any one. *Work v. Harper*, 24 Miss. 517; *White v. Denman*, 1 Ohio St. 110; *Blood v. Blood*, 23 Pick. 80; 2 Washb. Real Prop. (3d ed.) 139. In the present case the justice in Franklin county had no authority to take and certify the acknowledgment of an instrument conveying lands in Jefferson county, and the acknowledgment, therefore, was a nullity, and the mortgage, although recorded, imparted no constructive notice.

But it is contended here, and the court below seem to have taken the same view, that our statute concerning evidence has cured the defect so as to make the record give the requisite notice. In support of this position that section is quoted which provides as follows: "The records heretofore made by the recorder of the proper county, by copying from any deed of conveyance, deed of trust, mortgage, will or copy of a will or other instrument of writing, that has neither been proven nor acknowledged, or which has been proven or acknowledged, but not according to the law in force at the time the same was done, shall, from and after the passage of this act, impart notice to all persons of the contents of such instruments, and all subsequent purchasers and mortgagees shall be deemed to purchase with notice thereof. R. C. 1855, p. 731, § 46; Wagn. Stat. 595, § 35.

This section was first passed in 1847, thence inserted in the revision of 1855, and continued in the statutes of 1865. If it has the effect ascribed to it, it, in a great measure, nullifies and renders nugatory the law on this subject of conveyances, so far as acknowledgment, certifying and recording are concerned. If the deed imparts notice without being acknowledged, or not acknowledged or proved according to law, then every instrument which the recorder may place upon the record is sufficient, although it is wholly wanting in the absolute requirements of the statute. It is hardly to be supposed that the legislature intended by this section to repeal, nullify and render nugatory the whole law in reference to the essential elements of acknowledgments and recording. But when we look at the history of the enactment, its scope and tenor, we find clearly that no such intention prevailed. The section was embodied originally in the somewhat famous limitation act, and was approved February 2, 1847. The act is entitled "An act to quiet vexatious

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land litigations," and was designed, in connection with the period of limitation, which was therein inserted, to put a speedy termination to controversies arising out of defects in conveyances which were made anterior to that period, and which were often informally executed. The section was imported and reenacted literally in the statutes of 1855, and thence continued in the revision of 1865.

Full force and effect was given to the section in the case of *Allen v. Moss*, 27 Mo. 354; but that was a case where the deed had been executed, acknowledged and recorded prior to the taking effect of the code of 1855. The word "heretofore" is the controlling one in the section, and shows that the act was intended to apply exclusively and solely to prior conveyances. The provision, then, applies to all conveyances made previous to the taking effect of the statutes of 1855, and no further. It derives no additional force or power from being found in the statutes of 1865, for it is the same identical section that existed in the former statutes; and where that is the case, the general statutes enact that the provisions of the general statutes, so far as they are the same as those of existing laws, shall be construed as a continuation of such laws, and not as new enactments. Wagn. Stat. 897, § 5.

For these reasons, as the mortgage was made and acknowledged subsequent to the adoption of the statute of 1855, I am of the opinion that it did not come within the provisions of the saving clause of the section, and that the court erred in its rulings as to this point.

One question remains to be disposed of. Schneider, in his answer, states, that he purchased the property at trustees' sale; but there is no averment that he paid any valuable consideration for it, or that he has parted with any thing in consequence of the purchase; nor is there any evidence in the record showing that fact. The very point was decided in *Chouteau v. Burlando*, 20 Mo. 482, and it was there held that a defective acknowledgment could only be taken advantage of by a purchaser for a valuable consideration. In all cases the purchaser must show that he paid the purchase-money before he is entitled to relief on account of not having notice. See *Halsa v. Halsa*, 8 Mo. 303; *Paul v. Fulton*, 25 id. 156; *Chouteau v. Burlando*, *supra*; *Aubuchon et al. v. Bender et al.*, 44 Mo. 560; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Wormley v. Wormley*, 8 Wheat. 421.

Although the ruling of the court as to the mortgage imparting notice was erroneous, yet we cannot see that the defendant was

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injured thereby, as by his own pleadings he does not stand in an attitude entitling him to relief.

Judgment affirmed. The other judges concur.

KIMM, plaintiff in error, v. WEISSERT.

(46 Mo. 532.)

Husband and wife—wife's separate estate.

A *feme covert* is absolutely a *feme sole* with respect to her separate estate, when she is not specially restrained by the instrument under which she acts, to some particular mode of disposition; and, although a particular mode of disposition is pointed out, it will not preclude her from adopting any other mode of disposition, unless there are words restraining her power of disposition to the very mode pointed out.

A married woman, having separate property, joined with her husband in a note for the purchase price of real estate purchased by the husband. To secure the payment thereof a deed of trust of the same real estate was executed by both husband and wife. Default being made in the payment the land was sold, and suit brought to make good the deficiency out of the wife's separate estate. *Held*, that the note was not a charge on the wife's estate. *Held, further*, that extrinsic evidence was not admissible to prove the intention of the wife to charge her separate estate.

THE case is stated in the opinion.

Pipkin & Thomas, for plaintiff in error.

Ahlvers & Williams, for defendants in error.

WAGNER, J. It will be unnecessary to notice in detail the preliminary question raised in regard to the pleadings in this case. That the petition, tested by the rules of scientific pleading, is badly drawn, is unquestionable. But, as the court disregarded that part of it which prayed judgment on the notes, and tried the cause solely on the equities, we are inclined to treat it simply as a petition in equity; and we think that justice will be subserved and the interests of the parties promoted by examining the case upon its merits. The proceeding was in the nature of a bill in equity, to subject the separate estate of the defendant Eliza to the payment of certain notes due and owing to the plaintiff.

From the record it appears that the notes were given in consideration of the purchase of certain lots sold by plaintiff, in the town of Kimmswick, Jefferson county, Mo. Some of the purchase-money was paid, and the notes were executed for the remainder, signed by both the defendants, they being at the time husband and wife. To secure the payment of the notes a deed of trust was made and delivered, in which both of the defendants joined; and default being made in the payments, the property was sold at trustee's sale, and not bringing enough to satisfy the amount due, this suit was brought to obtain satisfaction of the residue.

It also appears that, at the time the property was purchased from Kimm, the defendant Eliza was possessed of a lot in Windsor Harbor, as her separate estate, but that the plaintiff had no notice of that fact, and this is the property which is now sought to be proceeded against.

The circuit court granted the relief prayed for, declared the debt a lien upon the estate, and ordered its sale for satisfaction. This decree was reversed in the district court, upon a mere question of pleading. The deed conveying the estate to the defendant Eliza, contains this clause, viz. : "To have and to hold, together with all the rights, immunities, privileges and appurtenances to the same belonging, unto the said Eliza Weippert, for her sole and separate use and benefit and behoof, separate and apart from her said husband, and for her heirs and assigns forever, with full power, by her deed duly executed and joined in by her said husband, to incumber, sell and convey the same conditionally or absolutely. The said John Weippert shall, in no event, have or obtain any interest or estate in said property by virtue of this deed, but the same shall belong absolutely to the said Eliza Weippert, as her own separate and individual property." It is now contended, that, as the deed conveying the separate estate to Mrs. Weippert provides that she may dispose of it by joining with her husband in a conveyance for that purpose, she is incapable of disposing of it in any other way; and it is further insisted that, in no event, is the separate estate chargeable for the debt. The deed vests in Mrs. Weippert the full, absolute and complete title, and gives her the entire ownership, and that will be generally held to carry with it the most ample power of disposition. Some of the earlier cases decided, that where a particular mode was pointed out in the deed to a married woman, by which she might convey her separate estate, she was restricted and could convey by

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that mode only. Chancellor KENT was of the opinion that the power of disposition of the separate estate of the wife by her is not absolute, but only *sub modo* — to the extent of the power given her by the instrument,— and if the instrument points out a particular manner of disposition, then no other can be adopted, although there is no express prohibition of any other mode; and there are other authorities of the same purport. *Jacques v. M. E. Church*, 3 Johns. Ch. 77; *Lancaster v. Dolan*, 1 Rawle, 231; *Thomas v. Farwell*, 2 Whart. 11; *Morgan v. Elam*, 4 Yerg. 375; *Rogers v. Smith*, 4 Penn. 93. But the later, better and prevailing opinion is, that a *feme covert* is absolutely a *feme sole* with respect to her separate estate, when she is not specially restrained, by the instrument under which she acts, to some particular mode of disposition; and, although a particular mode of disposition is pointed out, it will not preclude her from adopting any other mode of disposition, unless there are words restraining her power of disposition to the very mode pointed out. *Jacques v. M. E. Church*, on appeal, 17 Johns. 548; *Vizonneau v. Pegram*, 2 Leigh, 183; *West v. West*, 3 Rand. 373; *Whitaker v. Blair*, 3 J. J. Marsh, 239; *Strong v. Skinner*, 4 Barb. 546-553; *Machir v. Burroughs*, 14 Ohio St. 519; *Leaycraft v. Hedden*, 3 Green's Ch. 512. When the leading case of *Jacques v. M. E. Church*, *supra*, was in the court of errors, where all the law judges concurred in reversing the judgment of the chancellor, SPENCER, C. J., declared that the decisions fully established, "That a *feme covert*, with respect to her separate estate, is to be regarded in a court of equity as a *feme sole*, and may dispose of her property without the consent or concurrence of her trustee, unless she is specially restrained by the instrument under which she acquires her separate estate;" and "that the established rule in equity is, that when a *feme covert*, having separate property, enters into an agreement, and sufficiently indicates her intention to effect it by her separate estate, a court of equity will apply it to the satisfaction of such an engagement." And PLATT, J., considered the rule to be, "That a *feme covert*, having a separate estate, is to be regarded as a *feme sole* as to her right of contracting for and disposing of it. The *jus disponendi* is incident to her separate property, and follows, of course, by implication. She may give it to whom she pleases, or charge it with the debts of her husband, provided no undue influence be exerted over her; and her disposition of it will be sanctioned and enforced

by a court of equity without the assent of her trustee, unless that assent be expressly made necessary by the instrument creating the trust. And the specification of any particular mode of exercising her disposing power does not deprive her of any other mode of using that right, not expressly, or by necessary construction, negatived in the devise or deed of settlement." In the instrument we are now considering, there is no restriction or limitation. There are affirmative words showing that the wife may convey by joining with her husband, but there is nothing to indicate that it was intended that she should be restrained to that particular mode. As the absolute title was cast upon her, the *jus disponendi* accompanied it; and, in the absence of negative words limiting her power in regard to the manner and means to effect a charge or disposition, I am of the opinion that it was entirely competent for her to incumber or sell in any way she saw proper. Did her signing the notes in connection with her husband evince an intent to charge her separate estate? The ruling of this court has been that, where a married woman executed a promissory note jointly with her husband, although it did not appear on what account the note was executed, whether for the benefit of the wife or of the husband, or for their joint benefit, equity would subject real estate held to the separate use of the wife to the payment thereof, and would decree a sale of the same. *Whitesides v. Cannon*, 23 Mo. 457; *Coates v. Robinson*, 10 id. 757; *Clafin v. Van Wagoner*, 32 id. 252; *Schafroth v. Ambs*, 46 id. 114. In *Whitesides v. Cannon*, Judge LEONARD, in delivering the opinion of the court, although professing to follow strictly the case of *Coates v. Robinson*, entered into a very elaborate discussion of the question and a thorough review of the English cases. That the conclusion which he deduced is amply sustained by the English equity authorities is undeniable, and yet it must be admitted that it rests on no very satisfactory foundation, and that the best considered American cases have greatly changed and modified it. The whole doctrine of proceeding against the separate estates of married women is the creature of equity, and was resorted to to prevent injustice. The separate estate was a provision for the wife's separate use and benefit, independent of her husband, in which he had no interest, over which he had no right of control. She could not, at common law, hold the legal title to property, either personal or real, for the reason that during her state of coverture she and her husband were considered one person, and her iden-

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tity, so far at least as the right to hold was involved, was lost or merged in him. There was, therefore, no way at law in which such separate estate of the wife could be reached to satisfy the demands upon it, however equitable and just, and although they may have been created by her for her individual benefit and upon the credit of her separate estate. 2 Sto. Eq. Jur., §§ 1366—1368.

To prevent the great injustice which might otherwise arise, and inasmuch as the wife's creditors had not the means at common law of compelling payment of her debts which she contracted to pay out of her separate estate, courts of equity undertook to give effect to them—not as personal liabilities, but by laying hold of the separate property as the only means by which they could be satisfied. 2 Spence's Eq. Jurisdic. 324. Grave doubts were for a while entertained whether the wife could dispose of the property without special authority conferred by the instrument conveying it to her, but it was finally decided that she could, on the ground that the right of disposal was a necessary incident to the right of property. It is undoubted that this universal *jus disponendi* was the exclusive and only foundation for the right in question. Lord THURLOW, in the case of *Fettiplace v. Gorges*, 3 Bro. C. C. 8, places the right upon this ground, and I am not aware that any other basis has ever been suggested for it. Assuming, then, this to be the foundation, would not reason dictate that the wife, to avail herself of it, should make some disposition of the specific property itself, or by some act clearly indicate an intention to charge it and render it liable? Yet the master of the rolls, in *Norton v. Turvill*, 2 P. Wms. 144, and in *Standford v. Marshall*, 2 Atk. 69, held the separate estate of a married woman liable for the payment of her bond, although the bond in no way referred to her separate estate, and in the latter case was given for money lent to her husband. Lord Chancellor THURLOW followed these cases, and the reasoning in support of them seems to be this: that it being the rule in equity that a wife who had a separate estate might deal with such estate in the same manner as if she were *sole*, it followed that such estate was liable for her engagements in the same manner as it would be if she were a *feme sole*. The equitable rule, which, being founded in the right of the wife to dispose of her property, went no further than to allow her to make contracts specifically appropriating or charging her separate estate, was thus extended so as to enable her to contract generally, without in any manner referring to such estate.

The doctrine was severely characterized by Chancellor KENT in *The M. E. Church v. Jacques*, 3 Johns. Ch. 77. In his admirable criticism of the English cases, where, speaking among others of the authorities above referred to, he says: "It is difficult to perceive upon what reasoning or doctrine the bond or parol promise of a *feme covert* could for a moment be deemed valid. She is incapable of contracting, according to the common right mentioned by Lord MACCLESFIELD; and if investing her with separate property gives her the capacity of a *feme sole*, it is only when she is directly dealing with that very property. The cases do not pretend to give her any of the rights of a *feme sole* in any other view, or for any other purpose." But though, as above intimated, Lord THURLOW followed the cases before cited, he seems to have been dissatisfied with the reasoning on which they were based; and in *Hulme v. Tenant*, 1 Bro. C. C. 16, which is regarded as the leading case on the subject, where the separate estate of a wife was held liable for the payment of her bond given for money borrowed, part of which had been borrowed by her husband and the residue by herself, he uses this language: "I take it, therefore, it is impossible to say but that a *feme covert* is competent to act as a *feme sole* with respect to her separate property when settled to her separate use; but the question here goes a little beyond that. It is not only how far she may act on her separate property; I have no doubt about that; but the question is, how far her general personal engagements shall be executed out of her separate property." Although he clearly pointed out the distinction as to the liability of the separate estate, he yielded to the previous cases, and held the estate chargeable. He further adds: "I have no doubt about this principle, that if a court of equity says a *feme covert* may have a separate estate, the court will bind her to the whole extent as to making the estate liable to her own engagements, as, for instance, for payment of debts," etc.

Lord ELDON repeatedly expressed his disapprobation of the decision in *Hulme v. Tenant*, but, according to his accustomed habit of always doubting but never overturning judgments, he followed the rule therein laid down. But afterward, in the case of *Bolton v. Williams*, 2 Ves. 138, Lord Chancellor LOUGHBOROUGH rejected the reasoning of Thurlow as unsound, and denied the liability of a married woman's separate estate for her general parol engagements, and explained the previous cases upon the ground that the securities which the wife had executed operated as appointments of her sepa-

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rate property ; that is, as appropriations or pledges of such property for the payment of the debt for which the security was given. This new doctrine, that a written security was an appointment, rested on no substantial foundation, and was plainly erroneous, and proceeded upon the assumption that the wife's separate estate was not liable for general engagements, but only such as were specifically charged upon it, and yet held that it was liable for a bond or note which in no manner referred to it. This theory, that a written security was an appointment and a charge, while it was otherwise with a mere parol promise, was maintained unchanged from the time of its introduction by Lord LOUGHBOROUGH, in *Bolton v. Williams*, until the case of *Murray v. Barlee*, 3 M. & K. 209, when Lord BROUGHAM rejected the distinction between a written security and a promise by parol, and extended the rule so as to make the parol engagement of the wife a charge as well as her bond or note.

"In all these cases," says the lord chancellor, at page 223, "I take the foundation of the doctrine to be this: the wife has a separate estate, subject to her own control and exempt from all other interference or authority. If she cannot affect it, no one can; and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise is whether or not she has validly incumbered it. At first the court seems to have supposed that nothing could touch it but some real charge, as a mortgage or an instrument amounting to an execution of a power, where that view was supported by the nature of a settlement, but afterward was more guarded, and the court only required to be satisfied that she intended to deal with her separate property. When she appeared to have done so, the court held her to have charged it, and made the trustees answer the demand thus created against it. A good deal of the nicety that attends the doctrine of powers thus came to be imported into the consideration of the subject. If the wife did any act, directly charging the separate estate, no doubt could exist; just as an instrument, expressed to be in execution of a power, was always, of course, considered as made in execution of it. But so, if by any reference to the estate, it could be gathered that such was her intent, the same conclusion followed. Thus, if she only executed a bond, or made a note, or accepted a bill, because those acts would have been nugatory if done by a *feme covert* without any reference to her sepa-

rate estate, it was held, in the cases I have above cited, that she must be intended to have designed a charge on that estate, since, in no other way, could the instrument thus made by her have any validity or operation; in the same manner as an instrument, which can mean nothing if it means not to execute a power, has been held to be made in execution of that power, though no direct reference is made to the power. Such is the principle. * * * But doubts have been, in one or two instances, expressed, as to the effect of any dealing whereby a general engagement only is raised; that is, where she becomes indebted without executing any written instrument at all. I own I can perceive no reason for drawing any such distinction. If, in respect of her separate estate, the wife is in equity taken as a *feme sole*, and can charge it by instruments absolutely void at law, can there be any reason for holding that her liability, or, more properly, her power of affecting the separate estate, shall only be exercised by a written instrument? Are we entitled to invent a rule, to add a new chapter to the statute of frauds, and to require writing where the act requires none? Is there any equity reaching written dealings with the property, which extends not also to dealings in other ways, as by sale and delivery of goods? Shall necessary supplies for her maintenance not touch the estate, and yet money furnished to squander away at play be a charge on it, if fortified by a scrap of writing? No such distinction can be taken upon any conceivable principle." But the reasoning of Lord BROUGHAM, in *Murray v. Barlee*, has been since overthrown, and it constitutes no longer the doctrine of the English courts. In the case of *Owens v. Dickinson*, 1 Craig & Ph. 58, Lord Chancellor COTTENHAM combated the assumption, that, because a married woman has executed a bond or note, or contracted a debt in any other form, therefore she must have intended to charge such debt upon her separate estate. He shows that, if the doctrine is sound, then every debt must become a specific lien upon the separate estate, to be paid in the order of its priority, while Lord BROUGHAM held that such debts are all to be paid *pari passu*. He then proceeds to prove that a contract which is entirely silent as to the separate estate, and makes no reference to its existence, cannot, by any legal reasoning, be shown to have been intended as a disposition of such estate. He says: "It would have been operative upon the *feme covert's* separate estate, but not by way of the execution of a power, although that has been an expression sometimes used, and, as I apprehend, very inaccurately

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used, in cases where the court has enforced the contracts of married women against their separate estates. It cannot be an execution of the power, because it neither refers to the power nor to the subject-matter of the power; nor, indeed, in any of the cases has there been any power existing at all. Besides, it was argued in *Murray v. Barles*, if a married woman enters into several engagements of this sort, and all the parties come to have satisfaction out of her separate estate, they are paid *pari passu*; whereas, if the instruments took effect as appointments under a power, they would rank according to the priorities of their dates. It is quite clear, therefore, that there is nothing in such a transaction which has any resemblance to the execution of a power. What it is, it is not easy to define. It has sometimes been treated as a disposing of the particular estate, but the contract is silent as to the separate estate; for a promissory note is merely a contract to pay, not saying out of what it is to be paid or by what means it is to be paid; and it is not correct, according to legal principles, to say that a contract to pay is to be construed into a contract to pay out of a particular property so as to constitute a lien upon that property. Equity lays hold of the separate property, but not by virtue of any thing expressed in the contract; and it is not very consistent with correct principles to add to the contract that which the party has not thought fit to introduce into it."

The view taken of the matter by Lord THURLOW in *Hulme v. Tenant* is more correct. According to that view, the separate property of a married woman being a creature of equity, it follows that if she has a "power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at law of compelling payment of those debts, a court of equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."

Lord COTTENHAM here does not go back to the doctrine of THURLOW, but attempts to support the established rule by an entirely new process of reasoning. It will be thus seen, that, while the English chancellors have steadily adhered to the principle, hardly any two of them agreed upon any common ground by which it can be supported. The views of Lord COTTENHAM will prevail till some subsequent chancellor shall detect in them some fallacy, and what reason-

ing he will resort to in support of the cases it is impossible to foretell. It seems that a rule which has to be constantly upheld by inharmonious, floating and contradictory reasons cannot rest on any very fixed or satisfactory basis. The latitude of construction which the courts of England have maintained is calculated to elude and defeat the very object for vesting separate property in married women. In the majority of cases the property is given to her "to protect her weakness against her husband's power, and her maintenance against his dissipation." But if the mere fact of her signing a promissory note, not for her own benefit, is to be held as an appropriation or a ground for subjecting her estate to payment, the protection is an illusion. The supreme court in Massachusetts, after a very able discussion of the subject, came to the following conclusion: "And we think," the court says, "upon mature and full consideration, that the whole doctrine of the liability of her separate estate to discharge her general engagements rests upon grounds which are artificial, and which depend upon implications too subtle and refined. The true limitations upon the authority of a court of equity in relation to the subject are stated with great clearness and precision in the elaborate and well-reasoned opinions of the court of appeals in New York, in the case of *Yale v. Dederer*; and our conclusion is, that when, by the contract, the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its income to the extent to which the power of disposal of the married woman may go. But when she is a mere surety, or makes the contract for the accommodation of another, without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument makes the debt a charge upon it." *Willard v. Eastham*, 15 Gray, 328, per HOAR, J. And it is the express doctrine of the best reasoned authorities that to render the separate estate of a married woman liable, the debt must be contracted either for the benefit of the separate estate or for her own benefit, upon the credit of the separate estate, or where in the instrument executed by her she makes a specific charge upon her estate. *Jacques v. M. E. Church*, 17 Johns. 548; *Willard v. Eastham*, *supra*; *Gardner v. Gardner*, 7 Paige, 112; 22 Wend. 528; *Curtis v. Engel*, 2 Sandf. Ch. 287; *Dyett v. North American Coal Co.*, 20 Wend. 570;

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Knowles v. McKamly, 10 Paige, 343; *Yale v. Dederer*, 18 N. Y. 265; 22 id. 450; *Todd v. Lee*, 15 Wis. 365.

It is not a question as to the wife's power to charge her separate estate, for that is conceded, but it rests essentially upon the manner and purpose. It is to be regretted that the attention of Judge LEONARD was not particularly called to the reasons of the rule, and the qualifications above suggested, when he reviewed the cases in *Whitesides v. Cannon*. The case of *Coates v. Robinson*, 10 Mo. 757, is entirely consistent with the limitations in the authorities above referred to. There, Mrs. Coates was possessed of a separate estate, and she purchased of Johnson a tract of land, for which she and her husband gave their promissory notes. The title bond was executed to her, and the land was to be deeded to her on the payment of the purchase-money. Here was a contract in which she was wholly interested, for her personal benefit, in which she received the consideration, and for the payment of which her separate estate was of course liable. It is true Judge NAPTUN, in delivering the opinion of the court, did not advert to this distinction, but placed the decision upon the broad ground advanced by the English courts, though the facts of the case did not require the enunciation of the rule to that extent. And Judge LEONARD, following the case implicitly, restates the doctrine in its fullest latitude. Without undertaking to unsettle any law, or overrule any case decided in this court, I have felt constrained to express my dissatisfaction with the extent to which the doctrine has been carried. But, admitting that we are bound by the prior decisions, does this case show that Mrs. Weippert intended to charge her separate property? The law, in its utmost rigor, places the charge or liability on the ground that signing a note evinces an intent to make the separate estate liable, otherwise the transaction would be nugatory. The undertaking is wholly implied. Judge STORY, while conceding the position with evident hesitation, cautiously adds, that it furnishes "a strong case of constructive implication, founded more upon a desire to do justice than upon any satisfactory reasoning." 2 Sto. Eq. Jur., § 1400.

Mrs. Weippert was introduced as a witness, and testified, against the objections of the plaintiff, that at the time she signed the notes and joined in the execution of the deed of trust she had no intention of burdening her separate estate; and the plaintiff then offered himself as a witness, and stated that at the time the contract was

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entered into and the papers drawn he did not know that Mrs. Weippert owned any separate property. This evidence should have been excluded. The intention could not be proved by extraneous evidence *dehors* the contract, but must be inferred from, and, therefore, is embraced in, or manifested by, the contract itself. No court has ever held or intimated that parol evidence was admissible to prove that the bond or note of a *feme covert* was intended to be a charge upon her estate. To permit this would be in direct conflict with the rule which excludes parol evidence offered to explain a written instrument. SELDEN, J., in *Yale v. Dederer*, 22 N. Y. 456. The very point was decided by the court in Kentucky, where it was held that the declaration of a married woman at the time she signed the note, that her separate property should not go for the purpose of its payment, was properly excluded. 7 B. Monr. 293. The intent, to be of any importance, must be a part of the contract; that is, the true meaning of the contract, when justly interpreted, must be that the debt which it creates should be a charge upon the estate. We are, then, to arrive at our conclusion by throwing out of view entirely the parol testimony and deciding the case upon the written instruments. A part of the purchase-money was paid, the notes were made for the balance, and to secure payment a deed of trust was executed upon the whole property purchased. To my mind it is clear that this was the only security intended or thought of by the parties, and that there was no design of charging the separate property of the wife.

The judgment of the district court, although not given for the proper reason, will be affirmed.

NOTE. — See *The Corn Exchange Ins. Co. v. Babcock*, 1 Am. Rep. 601. — REP.

Britton v. Dierker

BRITTON v. DIERKER, appellant.

(48 Mo. 521.)

Promissory note — alteration — discharge of surety.

The maker of a promissory note altered its date without the knowledge or consent of the surety thereto, after execution, but before delivery. *Held*, that the surety was discharged by the alteration.

THE facts are set forth in the opinion.

Bruere, for appellant.

Lewis, and *Orrick & Emmons*, for respondents.

CURRIER, J. The evidence given on the trial of this cause tended to show that the note sued on was executed on the part of the defendant as the surety of the other makers; that after the note was signed by him, and without his knowledge or consent, but, while it remained in the hands of the other makers, the date of the note was changed from "October —, 1867," to "November 17, 1867;" that such alteration was made prior to its delivery and without the privity of the plaintiff. The note was made payable to the order of the plaintiff six months after date. The trial was by the court, and defendant asked the following instruction, which was refused: "If the court believes from the evidence that the word 'October' or the date of the month was struck out, and the date 'November 17' inserted after the same was executed and delivered by the defendant to Barthol (one of the makers of the note), and that this was done without the consent or authority of the defendant, then the court will find for the defendant, even if it should believe that such alteration was made before the note was delivered to the plaintiff."

The refusal of this instruction is the principal matter complained of in the action of the court. The instruction presented a correct view of the law and ought to have been given.

The date was a material part of the note, and its alteration without the surety's consent vitiated the note as to him. It ceased to be the same instrument he had signed, and imposed a liability dif-

ferent from that he had assumed. "The law," says Chief Justice TENNY, "carefully guards the rights of sureties upon an instrument, whether the relation of principal is shown by being a surety, in the technical sense of the term, indorser or otherwise. A promissory note, signed by the principal and surety, or a note or bill indorsed for the accommodation of another party thereto, defines the liability intended to be assumed; and any alteration changing this liability without his consent will discharge him, such as the change of the date, the amount, the time or place of payment." *Waterman v. Vose*, 43 Me. 511. This is undoubtedly a correct statement of the law on the subject to which it relates. And it makes no difference that the alteration was made by one of the makers prior to the delivery of the note. *Wood v. Steele*, 6 Wall. 80. In all material circumstances *Wood v. Steele* is identical with the case now under consideration. There the date of the note was changed from "September, 1858," to "October 11, 1858," without the consent of the surety, and he was held thereby to be discharged, although the change was made by one of the makers of the note prior to its delivery. *Heffner v. Wenrich*, 32 Penn. St. 423; 2 Pars. Notes and Bills, 550; 33 Mo. 398, 406, 542.

The judgment will be reversed and the cause remanded; the other judges concurring.

CASES
IN THE
SUPREME COURT
OF
GEORGIA.

STEWART and CUTTS, plaintiffs in error, v. MORDECAI.

(40 Ga. 1.)

Removal of causes to federal court.

An affidavit filed in conformity to the acts of congress, passed 27th July 1866, and 2d March, 1867, relating to removal of causes from state to United States courts, cannot be traversed in the state court.

The right of a defendant to a transfer of the cause is not defeated by the fact that his co-defendant is a resident of the same state with the plaintiff, provided a severance can be had, and the rights of the petitioner can be determined separately.

MOTION to remove case from Sumter superior court to United States circuit court.

In this motion three causes were involved. The first was an action by Mordecai, of South Carolina, against Cutts and Stewart, of Georgia, maker and indorser, respectively, of a promissory note; the second was an action to enforce the statutory foreclosure of a mortgage, given as security for said note by Stewart to Mordecai; the third was a bill filed by Stewart against both Mordecai and Cutts, praying that Stewart be subrogated to certain rights of Cutts, and that Mordecai be enjoined from dismissing his suits.

Application was then made by Mordecai for removal of said causes into the fifth circuit court of the United States for the southern district of Georgia. Counsel for Stewart proposed to traverse averments of "local influence" and "inability to obtain

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justice" contained in Mordecai's affidavit, but the traverse was disallowed. Objections were then taken to the removal, in that Cutts was a necessary party to the determination of rights of parties in the federal court, and that Mordecai was bound by his previous choice of courts. Objections overruled, and orders made removing causes. The case was then brought to this court on errors assigned as above.

Hawkins & Burke, Lyon, De Graffenreid & Irvin, for plaintiffs in error.

Nisbets & Jackson, for defendants, cited: Act of congress, 1866; 4 Abbott's Dig. 76. Act of congress, 1867; 18 How. 467; 4 McLean, 202; 5 id. 342; 6 id. 13; 2 Blatchf. 304; 15 How. 198.

BROWN, C. J. We think there can be no great difficulty about this case. The act of congress of 27th July, 1866 (14 U. S. Stats. at Large, 306), provides, in substance, that if, in any suit already commenced, or that may hereafter be commenced, in any state court, by a citizen of the state in which the suit was brought, against a citizen of another state, the matter in dispute exceeds the sum of \$500 exclusive of costs, and if the suit, so far as relates to the defendant who is the citizen of a state other than that in which the suit is brought, is or has been instituted or prosecuted, for the purpose of restraining or enjoining him, or if the suit is one in which there can be a final determination of the controversy so far as it concerns him, without the presence of the other defendants as parties in the cause, then, and in every such case, the defendant, who is a citizen of a state other than that in which the suit was brought, may, at any time before the trial or final hearing of the case, file a petition for the removal of the cause, *as against him*, into the next circuit court of the United States, to be held in the district where the suit is pending, and offer good and sufficient security for his entering in such court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in said cause affecting or concerning him, and also for his then appearing and entering special bail in the case if special bail was originally required therein; and it shall be thereupon the duty of the state court to accept the security and proceed no further in the cause against the

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defendant so applying for its removal; and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid in such court of the United States, the cause shall then proceed in the same manner as if it had been brought there by original process against the *defendant*, who shall have so filed a petition for its removal as above provided. It is also provided that such removal of the cause, as against the defendant petitioning therefor, into the United States court, shall not be deemed to *prejudice* or *take away* the right of the plaintiff to proceed at *the same time* with the suit in the state court as against the other defendants, if he shall desire to do so.

By the act of congress passed 2d March, 1867 (14 U. S. Stats. at Large, 558), it is declared, that, where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, and the matter in dispute exceeds the sum of \$500 exclusive of costs, such citizen of another state, whether he be *plaintiff* or *defendant*, if he will make and file in such state court an affidavit, stating that he has reason to and does believe, that from prejudice or local influence he will not be able to obtain justice in such state court, may, at any time before the final hearing or trial of the suit, file a petition to such state court for the removal of the suit into the next circuit court of the United States, to be held in the district where the suit is pending; and offer good and sufficient security for his entering in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in such suit, and doing such other appropriate acts as by the act to which this act is amendatory (act of July 27, 1866) are required to be done upon the removal of a suit into the United States court; and it shall be thereupon the duty of the state court to accept the security and *proceed no further* in the suit; and the said copies being entered as aforesaid in such court of the United States, the suit shall there proceed in the same manner as if it had been brought there by original process; and all the provisions of the act to which this is amendatory respecting any bail, attachment, *injunction* or other *restraining process*, and respecting any bond of indemnity, or any obligation given upon the issuing or granting any attachment, *injunction*, or other restraining process, shall apply with like force

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and effect in all respects to similar matters, process or things, in the suit for the removal of which this act provides.

But two points were seriously insisted upon in the argument for the plaintiff in error. First, that Stewart had the right to traverse the affidavit of Mordecai filed in conformity to the above recited acts. Second, that the United States circuit court cannot take jurisdiction of the case, because Cutts, who is a party defendant with Mordecai in the bill, is a citizen of Georgia, and his rights cannot be adjudicated in the circuit court, in the same state in which the complainant in the bill resides.

It is sufficient reply to the first ground to say that the act of congress is plain and imperative. It leaves nothing to construction. When the affidavit is filed and the bond given as required by it, it declares that it shall be the duty of the state court to accept the security and proceed *no further* in the suit. If a traverse of the affidavit should be allowed, and a trial had upon it, this would be a further proceeding which is forbidden by the act. Besides, the reason of the law is against this view. If the prejudice or local influence does in fact exist, which denies justice to the citizen of the other state, who makes the affidavit, it would operate the same denial of justice, perhaps in a greater degree, on the trial of the issue formed upon the traverse of the affidavit.

We are equally clear that the other ground cannot be sustained. Here the suit or bill was brought by Stewart against Mordecai, a citizen of South Carolina, who was plaintiff in the common-law proceeding, for the "purpose of restraining and enjoining him." This is one ground for the transfer. Another is, that "there can be a final determination of the controversy, so far as concerns *him*, in the United States court, without the presence of Cutts." If the claim set up by Stewart, to have the note on which he is a surety credited with the amount of usurious interest paid by Cutts to Mordecai in other transactions, can be sustained at all, it can be sustained as well without the presence of Cutts as a party as if he was present. If the amount should be allowed, and it is sufficient to satisfy the note on which he is surety for Cutts, the verdict must be for him in the state court or the United States court; if not, it could not be for him in either. If it entitles him to a credit, he can get the benefit of it in either court. If he needs the testimony of Cutts, he can have it under the rules of evidence which prevail in either court. Why, then, may not the final determination of the contro-

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versy, so far as it concerns Mordecai, be reached in the United States courts without the presence of Cutts as a party, and with as much justice to Stewart as if Cutts were a party?

But it is said the right of Cutts cannot be protected in this way. Why not? If Stewart can set up the usury, and defeat the recovery of Mordecai, it will inure to the benefit of Cutts as much as if he were a party. If Stewart shows in the United States court that the debt is paid, and gets judgment accordingly, Cutts is no longer liable upon it, either in the state or federal courts. And if the amount for which Mordecai is liable to Cutts exceeds the amount of the note, so as to entitle Cutts to a judgment, he is not barred from recovering it in a proper proceeding, by the judgment in the United States court in the case between Stewart and Mordecai. The act of congress is explicit, that the removal of the case to the United States court, by the defendant making the application, shall not be deemed to "prejudice or take away the right of the plaintiff to proceed at the same time with the suit in the state court against the other defendants, if he shall desire to do so." In other words, the removal of the case as to Mordecai amounts to a severance, and authorizes the litigation to be conducted partly in each court; provided the rights of Mordecai can be determined in the United States court without the presence of Cutts.

Again, if there are rights between Stewart and Cutts to be adjusted, that can be done in the state court as well as if this proceeding as to Mordecai had not been transferred to the federal court.

Let the judgment of the court below be affirmed.

SIMS, plaintiff in error, v. Cox.

(40 Ga. 76.)

Contract—measure of damages.

An agreement to deliver specific articles, to be worth a specified amount, is legally fulfilled by the payment of the money in lieu of the articles.

ACTION on contract. The facts are sufficiently set forth in the opinion.

W. S. Johnson, for plaintiff in error.

Robert Tombs, A. T. Akerman, Mathews & Reid, for defendant.

BROWN, C. J. By the first contract between the parties to this case, Sims agreed to purchase a plantation, with the stock, etc., upon it, from Cox, for one hundred bales of middling cotton, averaging four hundred pounds each, to be delivered at the Lexington depot by the 1st day of February, 1867, and one hundred bales, averaging four hundred pounds each, by the 1st day of February, 1868, or so soon as it could be put in good merchantable style for market, with interest on \$10,000, for twelve months, in the currency of the country. And, in case of the first hundred bales, it is said in the written contract, that said Sims guarantees to said Cox an average of \$100, in gold, for each bale of said cotton, with the *privilege* of paying the said Cox \$10,000, in specie, or its equivalent, in *lieu* of the one hundred bales of cotton.

Sims afterward found himself unable to meet his engagements, probably owing to the great fall in cotton, and the parties entered into another contract, by which they agreed to rescind the first contract; and Sims was to return the plantation and stock, or very nearly all of it, to Cox, and was to deliver to Cox eighty bales of cotton, averaging four hundred pounds, and averaging in quality middling—seventy to be delivered at once, and the other ten within the present week. And, in addition to this, Sims also promised, as part of the consideration for the rescission of the contract, to deliver to Cox, at said depot, on or before the 1st day of February, 1869, nearly one year after the date of said second contract, twenty bales

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of cotton, in good order, averaging in weight four hundred pounds to the bale, and averaging in quality middling; and said Sims *guaranteed* to said Cox, that said cotton would be *worth to him* sixteen and one-half cents per pound, in the common currency of the country.

When the time for payment came, cotton was worth twenty-six and one-half cents per pound in the market. Sims refused to deliver the cotton, and tendered to Cox its value, estimated at sixteen and one-half cents per pound, in payment of the claim. This Cox refused to receive, and brought this suit for the market value of the cotton at the time it was due. And the question for adjudication in the court below was as to the measure of damages. The court held, that the value of the cotton at the time it was due was the amount to which plaintiff was entitled, which the jury found. And this ruling is assigned as error.

Construing the two contracts together, and looking to all the facts and circumstances of this transaction, we think the parties intended to stipulate what should be the measure of damages, in case of the non-delivery of the cotton, or in case it should not be worth sixteen and one-half cents per pound when due. Sims had purchased the plantation and stock for two hundred bales of cotton, to be delivered as stipulated in the first contract, and had guaranteed that the first hundred bales should be worth \$100 per bale, in gold, with the privilege to pay that sum per bale *in lieu* of the cotton. It is a well-known fact that the price of cotton had declined very rapidly, and Sims, no doubt, found himself unable to deliver the cotton and make good the guarantee, or to pay the \$10,000 in gold. Cox then required one hundred bales of cotton, one-half of the whole number agreed upon as the price of the plantation, as a consideration for the rescission of the contract. And as Sims could pay but eighty bales, he agreed to take them, and give him one year to make the other twenty bales, but required a guarantee from Sims that the cotton on which he gave the indulgence should be worth to him sixteen and one-half cents per pound. In other words, he fixed the price of a rescission of the contract at eighty bales of cotton, paid down, and twenty more, to be worth sixteen and one-half cents per pound, payable in twelve months thereafter.

We think the just and fair construction of the contract is, that the parties agreed upon eighty bales of cotton to be delivered then, and twenty more, worth sixteen and one-half cents per pound, the

next February, as full satisfaction to Cox. In case the cotton had been worth only six and a half cents per pound when due, the measure of damages stipulated for would have been sixteen and one-half cents per pound, or ten cents per pound more than market value. On the other hand, as it was worth twenty-six and one-half cents, we think sixteen and one-half cents, or ten cents less than the market value, was still the measure of damages stipulated by the parties. This was mutual and just. Chipman on Contracts lays down the rule, as follows: "If A. give B. a note for \$100, payable in wheat, at a future day, at seventy-five cents per bushel, and wheat, on the day of payment, be \$1 per bushel, A. may, at his election, pay in wheat of an average quality, at seventy-five cents per bushel, or pay \$100 in money.

"All agreements to pay in *specific articles* are presumed to be made in favor of the *debtor*, and he may, in all cases, pay the amount of the debt in money, in lieu of the articles, which, by the terms of the contract, the creditor had agreed to receive instead of money. Poth. on Obl., No. 497. This case falls within the same principle, and the debtor may pay the money instead of the wheat, for the nature of the contract is this: The creditor agreed to receive wheat instead of money, and as the parties concluded that the price of wheat would, at the time of payment, be seventy-five cents per bushel, to avoid any dispute in relation to the price, fixed it in the contract at seventy-five cents per bushel, and if wheat at the time of payment be at fifty cents per bushel, still the debtor may pay in wheat at seventy-five cents." See Chipman on Contracts, 35 and 36; 3 Conn. 60; 5 Wend. 393.

We think this case falls within the rule laid down by this author, and the decisions referred to.

Judgment reversed.

Reid v. The Eatonton Manufacturing Company.

REID *et al.*, plaintiff in error, v. THE EATONTON MANUFACTURING COMPANY *et al.*

(40 Ga. 98.)

Corporations — Personal liability of stockholders.

A corporation cannot, by resolution or by-laws, impose personal and individual liability upon its members, unless the power is specifically granted in the charter or by general statute. The capital stock is the fund out of which the debts of a corporation must be paid, and dividends of profits already paid to the stockholders cannot be reached by creditors of the corporation. Funds due to a corporation (as for rent) may be reached by proper process.

CREDITOR'S BILL. The Eatonton Manufacturing Company was incorporated in 1835, and, having no capital except that invested in buildings and machinery, relied on borrowing money for running the factory. Their charter imposed no personal liability on the stockholders, and in order to obtain credit said stockholders, in 1849, met and enacted a series of by-laws, by which they pledged their individual credit in proportion to the shares held by each. On this understanding Reid became the creditor of the company and obtained judgment to the amount of \$20,000. In 1861 the company suspended operations, and during the following year the factory was hired and run by the Putnam Manufacturing Company, at a rent of \$2,000, which was never paid, although the profits were very large. In 1862 the corporation again resumed operations and continued until 1864 (when the factory was destroyed by Sherman's army), making immense profits, and distributing dividends regardless of Reid's claim of \$20,000. In one year the dividends were \$240,000 and the subsequent year, \$250,000.

A mill belonging to the corporation has been run by the president thereof since the suspension in 1864. The company is dissolved and owes \$60,000, with corporate assets of \$10,000. The creditors now claim said rent, dividends and the profits on the mill, or so much as will satisfy their demands; and that the stockholders be held personally liable for the indebtedness *pro rata*.

The bill was dismissed, and the case is brought to this court on errors assigned.

Wingfield & Capers, for plaintiffs in error.

Thomas G. Lawson, Nesbils & Jackson, for defendant.

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BROWN, C. J. The charter of this company contains no individual liability clause, and no general statute of this state imposed any such liability when the charter was granted. And we hold that it was not in the power of a majority of the stockholders, by any by-law which they might pass, to impose any such liability. This very question is decided by the supreme court of Massachusetts in the *Trustees, etc., v. Flint*, 13 Met. 539. In that case the charter imposed no personal liability upon the stockholders. But, under the usual power given for that purpose, the stockholders met and enacted by-laws, of which the following was one: "The members of this association pledge themselves in their individual, as well as their collective, capacity, to be responsible for all moneys loaned to this association, and for repayment of which the treasurer may have given his obligation, agreeably to the direction of the directors." This by-law was printed and distributed by the corporators.

John Flint, as the treasurer, afterward executed the note sued upon under this by-law. Judgment was obtained against the corporation, and execution issued, and was returned "wholly unsatisfied." Suit was then brought against Flint as a stockholder, and the supreme court of Massachusetts held that he was not liable. They say: "It is not, in the opinion of the court, within the powers conferred upon this and similar corporations to impose upon their members, by any such by-law, any personal and individual liability to third persons, beyond such as are specified in the charter, or in the general laws of the commonwealth. Such a power would be liable to great abuse, and would subject any member of a corporation, however liberal its charter in excluding individual liability, to be made responsible for the entire indebtedness of the corporation." The court adds: "The proposed evidence (of the declarations of the defendant that such liability existed) would therefore be inadmissible on the trial of this case before the jury, as it would not tend to change the defendant. Whether for such false representations he may be held responsible to those to whom he made them, or who may have lent their money upon the faith of them, is a question not now before us" We think this decision sound law, and we adopt it in this case.

2. Upon the other question made by this record we are also well satisfied. There is no allegation, by complainants in the bill, that the corporation was insolvent when the dividends were made, or that there was any fraud or collusion to their injury. At that time

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the company was doing a profitable business, and the property held by them as capital stock was amply sufficient for the payment of all the indebtedness of the corporation. The dividends were no doubt made in good faith, without any intention to defraud or injure creditors, and made at a time when creditors were by no means anxious to receive the only currency of the country (confederate treasury notes) in payment of the debts due them. Afterward the factory was burnt, during the war, by General Sherman's army, which reduced the company from a high state of prosperity to hopeless insolvency. Under these circumstances, we hold that creditors have no right to compel the stockholders to refund the dividends for their benefit.

The *capital stock* was a trust fund for the payment of the debts of the corporation, upon the faith of which alone the law presumes the credit was given, unless other security was taken at the time by the creditor. In the case of *Wood et al. v. Dummer et al.*, 3 Mason, 311, Mr. Justice STORY says: "It appears to me very clear, upon general principles, as well as legislative intention, that the *capital stock* of the bank is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment." The same rule which applies to a bank is applicable to any other corporation. Again Judge STORY says: "They (the stockholders) have the full benefit of all the *profits* made by the establishment, and cannot take any portion of the fund (the capital stock) until all other claims on it are extinguished."

The same doctrine is held by Judge LUMPKIN, in *Hightower v. Thornton et al.*, 8 Ga. 500, where he says: "The capital stock of a corporation, like that of a limited partnership or joint-stock company, under the act of this state of 1837 (Hotch. 373), is the amount fixed upon by the partners or associations as their stake in the concern. Upon *this* they get credit and transact business. It may not all be actually *paid in*, still they are liable to the public for the amount thus fixed. Additions, on the other hand, may be

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made to the original stock by a successful prosecution of the business, still these *profits* do not constitute *capital*."

We are satisfied this bill is not maintainable upon either of the grounds taken. If any of those who constitute the stockholders of this company have been guilty of fraudulent misrepresentations in procuring credit for the corporation, they are liable in a proper form of action, as individuals, to any one injured, just as they would be for like fraud in any other matter; but they are not liable as stockholders, under this by-law, for the debts of the corporation, nor are they liable to refund the dividends received by them, under the circumstances detailed by this bill, for the benefit of creditors. They must look to the corporate property—the capital stock—for satisfaction, and to such other personal security as they may have taken for their better protection.

Establish the rule that creditors may compel the stockholders of an insolvent corporation to refund dividends received in a fair course of business, and no man would be safe in holding stock. At the time the dividends are made the corporation may be in a prosperous condition, as was the case here, and a stockholder may receive the dividends in good faith as the legitimate incomes of his capital, and after he has sold his stock and ceased to have any interest in the company, some calamity may befall the company, which may cause its insolvency, and creditors, under the rule contended for, may compel him to repay the dividends, with interest, for their benefit. We do not think dividends, already paid out, are a trust fund for the payment of debts, which may be followed by creditors in a court of chancery and recovered for that purpose.

But we will not say that, in a proper case, where the corporation is insolvent, and the capital stock, upon the faith of which the credit was given, has become insufficient for the payment of the debts of the company, a case might not be made where a court of equity would enjoin the payment of future dividends to the stockholders till the debts are paid. Nor do we question the right of the creditors, in a court of equity, to compel stockholders to refund dividends made to them out of the capital stock itself. The whole capital stock is a trust fund for the payment of the debts contracted upon the faith of it, which the stockholders cannot divert from that object by distributing it as dividends, or otherwise dividing it among themselves.

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3. In reference to the rent claimed by these creditors for the use of the factory during the year when it was run by part of the stockholders, under the name of the Putnam County Manufacturing Company, we have only to remark, that, if any thing is due the company, a judgment creditor has an ample remedy at law, and can reach it by process of garnishment.

Let the judgment be affirmed.

CARRUGI, plaintiff in error, v. THE ATLANTIC FIRE INSURANCE COMPANY.

(40 Ga. 125.)

Contract of insurance — powers of agent.

A policy of insurance requiring that consent to subsequent insurance upon the same property should be in writing will not be rendered void when the agent of the company gives such consent *verbally*, and the insured, in good faith, acts upon it.

The powers of an agent, whose duty it is to take and revoke risks, include the power of consenting to a prior or subsequent insurance on the property.

ACTION on an insurance policy. The principal facts in this case and those to which the court directed their attention are as follows: Carrugi insured certain property, to the value of \$5,000, in the Atlantic Fire Insurance Company, of Brooklyn, New York, in January, 1866. One of the conditions of the policy was, "If any other insurance has been, or shall be hereafter, made upon said property, and not consented to by this company in writing, this policy shall be null and void." Carrugi obtained two renewals of the said policy, but before the last renewal he requested an additional insurance of \$5,000 of the agent of the Atlantic Fire Insurance Company, and was told that said company had not authorized him to insure more than \$5,000 on any property. Carrugi then stated to the agent that he would get the additional insurance in some other company, which was consented to by the agent, but not in writing. Acting upon this verbal assent, Carrugi obtained the additional \$5,000 insurance in other companies. The property was destroyed. The company refuse to pay the loss, insisting, among

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other points, that the failure to have the *written* consent of the company avoided the contract. A trial was had, and verdict rendered for plaintiff for \$4,625, principal, besides interest. Defendant's counsel moved for a new trial on various grounds, and Judge JOHNSON granted a new trial without assigning reasons. This was assigned as error.

Benning, Ramsey & Russell, for plaintiff in error.

Moses & Gerrard, for defendant.

MCCAY, J. This is an important question, one, within the last few years, of very common occurrence, but never yet distinctly before this court. Insurance agents, of whom every hamlet has its supply, are very anxious to take risks, and our people are too prone to trust entirely to them, as to what it is necessary to do to comply with the terms and regulations of their companies. A man frankly informs the agent that he has already one insurance, and desires another. Perfect good faith exists on his part. He tells the truth and the whole truth. He trusts the preparation of the papers to the agent, and finds, when a loss occurs, that because the agent has failed to enter in writing upon the policy the fact that the company is aware of, and consents to, the prior insurance, the policy is said to be void. So, too, after the policy has issued, he desires additional insurance; he informs the agent of it, he approves and consents, and the insured, thinking all right, takes new risks, *pays* out his money, and at the very time he feels that he has made himself doubly safe, he has only done that which makes his policy void. This is an every-day occurrence, and arises from the introduction of this new clause, only lately thought of, in insurance policies.

We have given this matter great consideration, and have come to the conclusion, that, if the agent be, in fact, informed, and do, in fact, consent, and the insured, relying on that consent, do, in good faith, pay out his money, it does not make the policy void.

The company, in this case, is a foreign corporation, its agent here is its representative, and is a general agent, for all the purposes of taking and revoking risks; *prima facie*, those who deal with the agent, in the line of the business, have a right to consider him as authorized to do and consent to all acts within the scope of the business. Consent to a prior or subsequent insurance is within

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that scope, as the every-day practice of the country proves, and if an agent does, in fact, so consent, and the insured, in good faith, acts upon it, we think it is fraud upon the insured for the company to set up that they had stipulated this consent to be in writing.

It will be noticed that this stipulation has nothing really to do with the *contract of insurance*. Double insurances are perfectly legal. They are, in fact, an advantage to the company, since, in case of loss, they can compel a division of the loss. The only object of this clause, at least the only legitimate object, is to guard against the over insurance of the property, and the consequent temptation to crimes. But, when it affirmatively appears that the consent was given, and that the insured has *acted* upon it, we think it would but be the perpetration of a fraud to permit the company to take advantage of its own wrong, and escape liability, because *its agent* has failed to do his duty to the insured.

For myself, I am of opinion that such stipulations are void. Parties may stipulate as they please, in their contracts, as to the several rights and obligations of each, but the mode by which it shall be proven, whether or not there has been a breach or performance of those stipulations, is matter to be regulated by law, and not by the stipulations of the parties. Whether parol evidence is admissible to prove the facts, or whether they can only be proven by writing, it seems to me is regulated by law, on grounds of public policy, and for the public convenience, and is not matter of stipulation. Would a promissory note from A. to B., stipulating that no proof of its discharge should be taken, unless it were proven by two witnesses, be binding? Would a contract to be performed on a certain day, and stipulating that the day should not be altered by a subsequent contract, without proof in writing, signed by the obligee, bind the obligor, if, in fact, for a new consideration, there should be a change of the day, and no writing be taken? I think not, and I think these stipulations stand on the same footing. It is an attempt to change the rules of evidence, to make a new law, to regulate the proceedings of the courts. This is not like the execution of a promise, which contains limitations as to the mode of its exercise. This is a simple attempt to change the mode by which the courts should arrive at whether there has been a performance or breach of a contract. In my judgment, parties cannot do that. Such rules and modes are regulated by law, on grounds of public policy. They might as well stipulate that the fact of consent should be proven

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only by the personal attendance of the witness, and not by interrogatories, or that it should not be proven, as our law now permits, by the parties.

The judgment of the court, in this case, is, however, put upon the ground that it would be a fraud upon the rights of the insured, after he has got the consent of the agent, and *acted upon it*, to insist upon the written consent. The issue before the jury, in this case, is wholly one of *bona fides*. If there was an intent, on the part of Carrugi, to defraud, as a matter of course the policy is void. It is the essence of these contracts that there should be the utmost good faith, and this on grounds of public policy, independent of the rights of the parties in the particular case.

It must be a strong case to induce us to interfere with the discretion of the court in motions for new trial. The law gives him a discretion. He has opportunities for knowledge about the witnesses, and the degree of credit to be given them, which cannot be gotten before this court. We do not think he has abused his discretion in this case.

Judgment affirmed.

DAVIS, plaintiff in error, v. BAGLEY *et al.*

(40 Ga. 181.)

Estoppel—Liability of administrator.

Acquiescence in the payment of funds by an administrator to certain persons under mistake of the legal rights of such persons does not estop the true heir from asserting her claim to such funds on being apprised of her rights.

An administrator, who in good faith makes investments of funds in his possession, which, on account of subsequent events beyond his control, become worthless, is relieved from responsibility under the constitution and laws of this state; and an administrator, who pays funds to persons at the time apparently entitled to such payment, but afterward found to be not entitled, is protected under the said relief provisions.

SUIT on an administrator's bond Jones died, leaving an estate of \$160,000, upon which Bagley was appointed administrator. There were ten heirs, one of whom was the plaintiff. Plain-

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tiff's husband, Davis, died before Jones' estate was distributed, leaving five children. Bagley was appointed administrator of the estate of Davis also. The administrator of the two estates, after having reserved such amounts as were deemed sufficient to pay the debts of Jones, and deducting such amounts as Davis' estate owed Jones' estate, found that there was \$6,000 due the Davises from the Jones' estate. He accordingly divided the \$6,000 equally among the mother and five children. It was afterward ascertained that Mrs. Davis should have received the whole amount according to the law. Mrs. Davis therefore brings suit against Bagley and his sureties, averring that Bagley held \$50,000 of the estate out of which she was entitled to one-tenth. Bagley's answer was payment (as above), and that the assets he then held were worthless confederate notes collected in due course of his administration, which entitled him to the benefit of the relief act. The defendants obtained a verdict.

Peabody & Brannon, D. H. Burts, for plaintiff in error.

E. G. Railford, for defendants.

MCCAY, J. 1. The important question in this case is, how far the acquiescence of Mrs. Davis in the payment of this money to her children binds her. It is admitted that there was a mistake. Bagley was the administrator of Mrs. Davis' father, and also of Mrs. Davis' husband. The share of Mrs. Davis in her father's estate *survived to her*. Davis having died before he reduced it into possession, it formed no part of his (Davis') estate. The act of the administrator in paying it over to himself, as administrator of Davis, and then paying it out to Davis' heirs, was a mistake. Mrs. Davis was entitled to all of it. As it was, her children got each \$1,000. The evidence is, that all the parties were mistaken in the law.

This is not the case of a contract where both parties stand upon their own judgment, and where no special duty is cast upon either. Bagley is a trustee, an officer appointed by the law to perform a specified duty, to wit: to administer this estate according to law; and the rules prescribing his duty are the law of the land. He had a duty to perform. If he failed, however ignorant or mistaken he may be, he cannot excuse himself. He has a mere ministerial duty to perform in *paying out* this estate, and if he pay any portion of it to one not entitled, he is responsible to those entitled.

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Mrs. Davis had no *duty* in the premises. She was under no *obligation* to keep Bagley informed as to the law, and her failure to instruct him as to his duties is no breach of any duty on her part. There is no pretense of any fraud or concealment by her. Indeed, it appears affirmatively from the record, that Bagley acted wholly without reference to any act or saying of hers. She, it is true, stood by and said nothing, made no objection, simply because she did not know she had any right to object. Bagley was not *mised* by her. That is affirmatively proven.

We do not think she is estopped. Estoppel always implies that the person estopped has, by his act, misled the other. Code, section 3700. It was not Mrs. Davis' duty to instruct Bagley as to the law. It was Bagley's duty to obey the law. He was the actor, sworn and bonded, authorized to take counsel and charge the estate for it; and we can see no reason for excusing him from the performance of his duty because Mrs. Davis, who was not bound to set him right, stood by, and, in her own ignorance, permitted him to go wrong.

2. The payment of this money to those not entitled to it is a *devastavit*. It is still in hand; the receipt is null. Bagley, as administrator of Jones, is chargeable with that much money. It does not necessarily belong to Mrs. Jones. It has never been legally separated from the estate of Jones. It is there for distribution among those entitled to it, whoever they may be. Mrs. Jones is one of the heirs at law, and if there be no good reason why it should not be paid to her, she may receive it. But the heirs at law are only entitled to what remains after the debts are paid.

3. Under our acts, passed in 1865 and 1866, and under the constitution of 1868, very liberal and just provisions are made for the protection of administrators who, in good faith, and under the laws in force at the time, made investments, which, without their fault, have turned out badly. There is also an act protecting administrators from liability for payments made to persons who, as the estate then stood, appeared plainly entitled to such payments, but who, as has since become apparent, were not entitled. And this is perfectly just. If the administrator acted in good faith, it would be very hard to hold him responsible for the untoward and unexpected results of the late war. The parties injured are not remediless; they can follow the moneys thus paid out into the hands of those who have received it.

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4. We think there ought to be a new trial in this case, in which Bagley shall be charged with the amount paid out to the children of Mrs. Davis, as a *devastavit*, but with the right on his part to the defenses allowed by the acts we have referred to, keeping also in view that any other claims there may be against the estate of Jones have their rights against the fund in hand, as well as Mrs. Jones.

Judgment reversed.

ENGEL, plaintiff in error, v. SCHEUERMAN.

(40 Ga. 206.)

Injunction — Foreign judgments.

The courts of one state may enjoin a citizen thereof from enforcing the collection of a judgment which he obtained in the courts of another state and which he is endeavoring to collect in such other state.

BILL for an injunction. The facts are sufficiently set forth in the opinion.

Peebles & Stewart, for plaintiff in error, cited *Haines & Hobbs v. Rawson*, 40 Ga. 356; 2 Paige's Ch. 402, 404, 606; Story's Eq. Juris. §§ 899, 900; Edw. on Injunc. 141, 142; 3 Vesey, Jr., 170, 182; 5 id. 71; 3 Atkins, 589.

Doyal & Nunnally, Speer & Beck, for defendants.

WARNER, J. The question presented for our consideration and judgment, in this case, is whether the complainant has the right, in a court of equity, to enjoin the defendant (he being a citizen of this state) from enforcing the collection of a judgment obtained by him, against the complainant, and his securities, in the supreme court of the city of New York, upon the statement of facts contained in the record. The defendant, Scheuerman, sued the complainant, Engel, in the courts of this state, on a claim for \$5,000, obtained a judgment thereon, which has been paid off and satisfied. While the suit was pending in the courts of this state, Scheuerman sued Engel, in the supreme court of New York, for the same

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identical claim, and held him to bail there. The complainant alleges in his bill praying for the injunction, that after he had paid off and satisfied the judgment obtained against him in this state, the defendant *fraudulently* led him to believe, both by word and act, that the suit pending against him in New York would be abandoned, and thereby prevented him from making his defense thereto, as he otherwise should have done; that the defendant, with a full knowledge that the judgment obtained in this state had been paid off and satisfied, afterward proceeded in the New York court and obtained a judgment there against him, for the same identical demand, and is endeavoring to enforce its collection against him and his securities there.

The states of the American Union, except for all purposes as specified in the constitution of the United States, are, in legal contemplation, foreign to each other. The courts of one state or county cannot exercise any control or superintending authority over those of another state or county, but they have an undoubted authority to control all persons and things within their own territorial limits. In such cases, the courts do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree, *in personam*, according to those equities, and enforce obedience to their decrees by process *in personam*. Story's Eq. Juris. § 899. In *Foster v. Vassall*, 3 Atk. 589, Lord HARDWICKE said: "If the bill be brought in England, and the cause of the suit arise in Ireland, on the plantations, as the defendant is here, the courts do *agere in personam*, and may, by compulsion on the person, by process of the court, compel him to do justice." In *Cranstown v. Johnson*, 3 Vesey, Jr., 183, the master of the rolls said: "I will lay down the rule as broad as this: this court will not permit him (the defendant) to avail himself of the law of any other country to do what would be *gross injustice*." In the case of *Massie v. Watts*, 6 Cranch, 148, Chief Justice MARSHALL, after reviewing the authorities upon this question, said: "Upon the authority of these cases, and of others, which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable *wherever the person be found*, although lands not within the jurisdiction of that court may be affected by the decree." In the case of *Mead v. Meritt*, 2 Paige, 403,

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which was relied on by the counsel for defendant in error, the chancellor recognizes the general principle in regard to jurisdiction of the person of the defendant, but says: "I am not aware that any court of equity in the Union has deliberately decided that it will exercise the power, by process of injunction, of *restraining proceedings* which have been previously commenced in the courts of another state. Not only comity, but public policy, forbids the exercise of such a power."

This bill is not filed for the purpose of *restraining the proceedings of the court* of New York; the courts of this state have no jurisdiction to do that; nor would the courts of this state have jurisdiction to enjoin the enforcement of a judgment obtained in the courts of New York, between citizens of that state, *resident there*. The question here is, whether a court of chancery, in this state, has jurisdiction to restrain the *personal action of the defendant*, so far as to prohibit him from enforcing the collection of the judgment obtained in the courts of New York, according to the facts of this case. There is a clear distinction as to the power and authority of a court of equity, in this state, to restrain by injunction the *proceedings of a court* in another state, and the power and authority of such court, to restrain, by injunction, the *personal action of a citizen of this state*. In the one case, a court of equity, in this state, has no jurisdiction; in the other, it has jurisdiction to restrain, by injunction, the *personal action* of the defendant himself from enforcing an *unconscientious* demand in another state, whether that demand is reduced to judgment or not, upon a proper case being made.

The record now before us, in our judgment, makes such a case. The defendant *voluntarily* came into the courts of this state, in the first instance, to have his claim adjudicated, and that claim has been adjudicated therein, paid off and discharged. We are not aware that comity between the several states of the Union requires that the courts of this state shall *assume* that the courts of the state of New York are any more competent to hear and decide the defendant's claim, and to do him justice, than are the courts of this state, to the jurisdiction of which he voluntarily submitted the same for adjudication, in the first instance. In restraining him, by injunction, from enforcing this unconscientious demand, in the state of New York, the court acts upon his conscience, *in personam*, and not upon *the courts* of that state; the *person* of the defendant is within

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the jurisdiction of the court; the proceedings of the courts in the state of New York are not, and we do not interfere with them. The supreme court in New York, in which the judgment was obtained, has no interest in the enforcement of that judgment, the defendant has; and a court of equity, in this state, having jurisdiction of his *person*, will restrain him from making that interest available, when it would be against *conscience* and the principles of equity that he should do so. In the language of the master of the rolls, in *Cranstown v. Johnston*, this court will not permit the defendant to avail himself of the law of any other country to do what would be *gross injustice*.

Let the judgment of the court below be reversed.

SHARMAN, plaintiff in error, v. HOWELL.

(40 Ga. 257.)

Bankruptcy — Liability of sheriff.

Notice of an adjudication in bankruptcy does not justify a sheriff who has seized property under an execution from a state court for refusing to sell such property where it has not been ordered into the bankruptcy court.

RULE against a sheriff. On the 8th of November, 1867, Howell obtained a judgment against Beall, and afterward issued a *fi. fa.*, and the sheriff levied it upon certain property of Beall. While the property was in the possession of the sheriff awaiting sale according to advertisement, the sheriff was served with a writ of protection issued by the court of bankruptcy in the matter of Beall, bankrupt. Thereupon the sheriff refused to sell said property and placed the same in the hands of Beall's attorneys. The judge ordered the sheriff to pay Howell the money due on his *fi. fa.* This is the error assigned.

Dryal & Nunnally, Hart & Alexander, for plaintiff in error.

Smith & Alexander, John J. Hall, for defendant.

MCCAY, J. There is nothing in the bankrupt law giving such an effect to the simple adjudication of bankruptcy, upon final pro-

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cess, in the state courts, as is contended for by the plaintiff in error. Causes pending are stayed, and property seized under attachment on *mesne process* cannot be sold. But if there be a *final* judgment, and the sheriff have seized the property, the simple adjudication in bankruptcy does not interfere with the proceedings. The title passes, it is true, to the assignee, but he takes it subject to the lien of the judgment. We do not say that if the bankrupt court found it necessary, in order properly to adjust the equities and rights of the creditors, to cause the property levied on by a sheriff to be sold under its direction, and the proceeds to be brought before it for distribution, it might not, by proper proceedings, cause it to be done. But there is no pretense that the sheriff was prevented from selling this property by any such proceeding. He took it upon himself to determine that which the bankrupt court did not think it necessary to do, and he must take the consequences.

Judgment affirmed.

FITZSIMMONS, plaintiff in error, v. THE SOUTHERN EXPRESS CO.

(40 Ga. 390.)

Agency — Liability of common carrier.

A person who voluntarily employs the agent of another, knowing the fact of such existing agency, is estopped from pleading the rule that the same person cannot be agent of two principals having conflicting interests.

Where an express company receives goods directed in a peculiar manner to the *care* of its agent at a specified place, it will be assumed that the shipper intended to make such agent his own agent for receiving the goods, and the express company is discharged from responsibility in delivering the goods to such agent.

ACTION on the case against Southern Express Company for loss of a box containing family silver, etc. On the 11th of February, 1865, Alston, the owner, shipped said box by said company from Columbia, S. C., to Charlotte, N. C., marked "care of L. F. Bates, superintendent Southern Express Company," and at the same time saw Bates, and requested him to keep the box safely in Charlotte until called for. The said box arrived in Charlotte, and was taken in charge by Bates, but was afterward lost. The owner of the box

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transferred his right to the plaintiff. Suit was brought against the company; a verdict was rendered for the defendant; a new trial was refused, and this is assigned as error.

Johnson & Montgomery and W. Hope Hull, for plaintiff in error.

William T. Gould and J. P. Carr, for defendant.

McCAY, J. We have no doubt that the verdict of the jury is supported by the evidence. The plaintiff in error has no right to a new trial, unless there be such error in the charge of the court as to require it.

The principal complaint made against the charge is, that the court told the jury, 1. "That in such a case as this the rule that one person cannot be the agent of two parties, who have conflicting interests, did not apply." And, 2. "That if the jury believed Alston shipped the goods to the care of Bates, he made Bates his agent, and a delivery to Bates discharged the company; thus, if goods are shipped to the care of the superintendent of Georgia railroad, it makes such superintendent the agent of the shipper, and a delivery to him relieves the company of all liability."

Some criticisms were made in the argument on other parts of the charge, but it was conceded, and we think properly, that if the two charges we have referred to were properly given, the other errors, if they were such, were not so material as to justify the reversal of the judgment of the court below, in refusing a new trial.

. As to the first point, we doubt if there be any such rule of law as was contended for, and which, it is complained, the judge said did not apply to such a case. Two parties may always, by *mutual consent*, no matter how diverse their interests, make a third their agent. It is true, if A. have an agent, that agent cannot, *without A.'s consent*, act as the agent of B., in a matter in which A.'s interest conflicts with B.'s. But B., who selects the agent, knowing he is the agent of A., cannot object to take advantage of his own wrong, in giving, knowingly, to the agent a trust, conflicting with his duty to A. This is plain common sense, and the every-day practice. It is not denied that Mr. Alston knew Bates was the agent of the express company, and if he *did* make Bates his agent, however the company might complain, Mr. Alston cannot.

2. Was there evidence to justify the other charge of the court? We think there was. The charge is justifiable if there was *any*

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evidence going to show that Alston made Bates his agent, that is, sent his goods to the care of Bates, meaning not to the company but to Bates, as an individual, Bates says he promised Alston to take care of the box, as though it were his own, and there is much in the testimony of both Alston and Bates to show that the mere *transshipment* of the box to Charlotte would not fulfill his intentions. He desired it, when there, to be kept and taken care of. He did not expect it to be delivered to Mrs. Fitzsimmons, on its arrival, but *stored*, until it suited him, or her, to get it. *Prima facie*, such a duty is outside of the business of an express company. Its undertaking is to *carry*. It is true, that, as a necessary incident of carriage, there is a duty, as bailee, to keep safely, until delivered, but an express company does not, *prima facie*, make contracts to keep, independent of the duty incident to their undertaking as carriers. As we have said, there is evidence from which it was competent for the jury to presume that Alston expected and intended more should be done than simply to carry his box and safely deliver it—that he wanted it *stored, watched, kept*, for an indefinite time, after it reached Charlotte. This duty the jury might presume from what Bates says Alston expected Bates, as an individual, to perform. We do not say the evidence of Alston and Bates proves this, but it goes to prove it, and, if so, it was proper for the judge to give to the jury the law to be applied to such a state of facts, if they believed, from the evidence, such a state existed.

But there was more in the evidence than the statements of Bates and Alston. The box was directed to “Mrs. Fitzsimmons, care of Bates, agent of the Southern Express Company, at Charlotte.” We are inclined to think that, if the address stood alone, it would justify the charge. The company would be bound to take care of this box, as incident to its duty as carrier, without any such direction. If nothing more was intended, why was any thing more said? The simple direction, to “Mrs. Fitzsimmons,” would have covered all that it is *now* contended was meant. If it had not been intended that a special trust was placed in Bates, why does his name appear? Nobody pretends that there was any custom of the company, or of those who dealt with it, to direct packages thus. It is an unusual and unnecessary addition to the address, unless something *more* was meant than would follow from the simple address to Mrs. Fitzsimmons. If any thing more was meant, then Bates was Alston’s agent, and a delivery to him complied with the contract.

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If Bates kept it in the company's rooms he did so as the agent of Alston, and if he shipped it to Richmond, he did that also as his agent. The cases in 2 Redfield on Railroads, 65, and the cases in 16 New York Court of Appeals, 515, are distinguishable from the case at bar in this, that *there* it was in proof that it was *common* to direct goods that way. That when they were designed for a locality not *on the line*, but in the country, on one side or the other, this direction was put there to indicate at what station they should be stopped, and sent inward. Either station, out of two or three, might be chosen, at the option of the consignor. We can easily see how such a custom might arise.

But Charlotte was on the line—it was the very point to which the goods were consigned, and we can see no meaning in putting them in the care of Bates, unless it was intended that *he*, not the company, should take care of them at Charlotte. They were in the care of the company without this. There is nothing in the testimony to hold the defendants below liable, in their capacity as *carriers*. If they are liable at all, it is as warehousemen, or simply bailees. In that capacity, we think there was sufficient evidence to justify the verdict. It is true, the evidence is not conclusive. But it is a well-settled rule, that the court will not disturb the verdict, unless it be strikingly against the weight of evidence.

Assuming that the direction did make Bates the agent of Alston, as mere warehousemen, and that, too, without hire, the company do not appear to have acted with such negligence as would authorize us, under the circumstances, to say that the verdict shocks the moral sense. It is plain this box was in danger at Charlotte. The company and other prudent people were moving their valuables to Richmond, and it would be very hard to hold the defendants below liable, unless they can show clearly what became of the box after it got to Richmond. Public history informs us of events there, just at that period, which make it very probable what became of it. In the going out of one army, and the coming in of another, in the burning and sacking of a city, a box of silver would hardly escape both fire and thieves.

Judgment affirmed.

Hines and Hobbs v. Rawson.

HINES & HOBBS, plaintiffs in error, v. RAWSON.

(40 Ga. 356.)

Conflict of jurisdiction — Injunction — Contempt.

Where the United States court and a state court have a concurrent jurisdiction, the court first acquiring jurisdiction of any matter retains it to the exclusion of the other.

Where parties commence proceedings in a state court, and in the course of litigation are enjoined from further action until certain matters are disposed of, it is a violation of the injunction order to institute proceedings in the United States court involving the matters enjoined; and the state court has power to punish the disobedience of its orders, although it cannot require the parties to dismiss their suit in the United States court.

MOTION to show cause why violation of an injunction should not be punished. Several of the creditors of the estate of Rawson filed their bill against Mrs. Rawson, the administratrix, and widow of the deceased. This was done by Hines & Hobbs *et al.*, solicitors of said creditors. The administratrix answered, and the result of the litigation was an order from the chancellor in February, 1869, enjoining the creditors from prosecuting their claims in any manner, by suit, or by levy and sale on the property of the estate, or of said administratrix, until all the assets were duly marshaled.

While this injunction was still in force, Hines & Hobbs commenced, in the United States circuit court, the foreclosure of a mortgage owned by some of said creditors (Trowbridge, Dwight & Co., of New York) against the estate of said Rawson, deceased, and which had been given during his life to secure said claims. Thereupon Mrs. Rawson sued out a rule to show cause why Hines & Hobbs should not be punished for violating said injunction. The defendants answered, among other things, that a great part of the property upon which foreclosure was sought had passed into the hands of third persons during the life of deceased, and was not claimed by the administratrix in any way. The chancellor ordered that said Hines & Hobbs dismiss their proceedings in the United States court as against the administratrix, and that in default thereof they be considered in contempt. The order is brought here for review.

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Vason & Davis, Hines & Hobbs, Lochrane & Clark, for plaintiffs in error.

Wright & Warren, for defendant.

MCCAY, J. L. That there is error in the judgment of the court as it stands is very clear. It was no violation of the injunction to commence proceedings for foreclosure as to the property which had passed into the hands of purchasers from Rawson before his death. It is true, that even as to this property the administratrix is, perhaps, a necessary party to a bill for foreclosure, but she is only a nominal party. None of the objects of the bill are thwarted by such a proceeding, and we think the defendants in this motion have a right to proceed against the property referred to, and if the rules of the United States court require it, to make her a party to that proceeding. But, so far as the proceedings in the federal court are intended to foreclose the mortgage on property, which is in the hands of the administratrix, we think such proceedings are a violation of the injunction.

1. The mortgagees are citizens of the state of New York, and under the constitution of the United States the circuit court has jurisdiction of the parties and subject-matter of the controversy. It is equally true that the mortgagee may, if he chooses, sue in the state court. The jurisdiction is concurrent. Now, in all such cases, as well by repeated decisions as by the necessities of the case, the court first acquiring the jurisdiction in fact has it to the exclusion of the other. 9 Wheat. 532; 20 How. 583; 10 id. 56; 14 id. 368; 23 id. 90. Interminable confusion would result from any other rule, while harmony and justice flow naturally from the rule as established.

2. When these parties filed their bill in Dougherty superior court, and in the regular course of judicial proceeding there they were enjoined from reducing their claims to judgment until the matters set up in the petition of Mrs Rawson for the injunction were disposed of, it is a direct violation of the order of the court in which, by their own motion, they are suitors, to seek another tribunal for the attaining of the very thing they are restrained from.

3. We recognize fully the doctrine that neither a state nor a federal court will restrain the other, even indirectly, by acting on the party, and admit that this rule, so well understood as to foreign jurisdictions, does not apply between the federal and state courts.

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But it will be found, on looking into these cases, that they are all cases in which the party sought to be enjoined was free to act when he sought the tribunal in which it was attempted to restrain him from proceeding. 2 Paige's Ch. 404; 2 Story's Eq. § 900. But in this case the defendant was not free to act. Of his own motion he had come into the state court in the regular course of proceedings there, this injunction had been put upon him by a court where he was a suitor, and, when he sought the federal tribunal, he *disobeyed* the order of the state court. No tribunal can permit such an indignity. If its orders are improvident, it is to be presumed it will, on motion, vacate them, and if it fail so to do, there is a writ of error to this tribunal, or, if the party take the proper steps, the law authorizes a removal of the controversy to the federal court. But a contemptuous disregard of the order of the court by one who is *a suitor in it*, authorizes the court to punish the offender, and we think, under the circumstances of this case, the court was authorized to do so.

We think, however, the shape of this judgment is obnoxious to objection. It requires the defendant to dismiss his proceeding in the federal court. Perhaps it may seem mere quibbling to find fault with the order for this reason, but it is best to keep up the proper distinctions, especially on so delicate a question as an apparent conflict of jurisdiction between courts equally supreme, and we think the court erred in requiring the defendant to *dismiss* his proceedings in the circuit court.

The state court, as we have said, has the right to punish for disobedience to its order. If the defendant sees fit to take the consequences, let him do so. Each court has its sphere and should keep within it, and we doubt not the chancellor below can find a mode of attaining his end, to wit, obedience to his injunction, other than an order directing the defendant to dismiss his proceedings in the federal court. We reverse the judgment, on the ground that the chancellor had no right to order the proceedings in the circuit court to be dismissed. But we have no doubt of his power to punish the defendant for violating his injunction, and to continue that punishment until he shows by his conduct that he is in fact obeying the process of the court.

BROWN, C. J., concurred, laying down the following rules, which are, in his opinion, applicable to the case:

1. The state courts are exempt from all interference by the

federal tribunals, and the federal courts are exempt from all interference by the state tribunals, and each is destitute of all power to restrain either the process or proceedings in the other. Circuit courts of the United States and state courts act separately and independently of each other, and, in their respective spheres of action, the process issued by the one is as far beyond the reach of the other, as if the line of division between them "was traced by landmarks and monuments visible to the eye." Appellate relations exist in a class of cases between the state courts and the supreme court of the United States, but there are no such relations between the state courts and the circuit courts.

2. The circuit courts of the United States and the state courts, in certain controversies between citizens of different states, are courts of concurrent and coördinate jurisdiction, and the general rule is, that as between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the coördinate court. Such questions usually arise in respect to property attached on mesne process, or property seized upon execution, and the general rule is, that where there are two or more tribunals competent to issue process to bind the goods of a party, the goods shall be considered as effectually bound by the authority of the process under which they were first attached or seized. 20 How. 583; 24 id. 454; 3 Wall. 334; 6 id. 195, 196.

3. In this case the plaintiffs in error having gone voluntarily into the state court, and an injunction having issued against them by that court, restraining further action till the assets of the estate could be marshaled, it was a contempt of the authority of the state court, into which the parties had voluntarily come, and which had obtained possession of the controversy, for the plaintiffs to commence proceedings in the United States courts upon the same matter of controversy, till the dissolution of the injunction in the state court, and the state court had the power to maintain its dignity and enforce its authority by punishing the attorneys of the complainants for violating its injunction, by bringing a suit in the United States court, or otherwise disobeying its process, till it had finally disposed of the matter in dispute.

But the state court cannot order the case dismissed in the circuit court. It can only punish those subject to its order who disobey its injunction, and it must leave the other party to the litigation

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to move in the circuit court to stay proceedings in the action there brought in violation of the injunction of the state court, till the final disposition of the case in that court. 10 How. 71.

WARNER, J., concurring. It appears from the record that Trowbridge, Dwight & Company are citizens of the state of New York, and that they have instituted a suit in the fifth circuit court of the United States, against Annie E. Rawson, as administratrix of C. W. Rawson, deceased, a citizen of this state, to foreclose a mortgage. The court below passed an order requiring Hines & Hobbs, attorneys at law for Trowbridge, Dwight & Company, to "dismiss the said suit or proceeding in the said fifth circuit court of the United States for the foreclosure of said mortgage, and in default thereof, that they be considered in contempt of this court." While I do not question the power and authority of the court below to punish the defendants for a violation of its process of injunction (if, indeed, it has been violated by them), I do deny the power and authority of the state court to order and require Hines & Hobbs, the attorneys at law of Messrs. Trowbridge, Dwight & Company, to dismiss their suit pending in the fifth circuit court of the United States, or, in default thereof, to be considered in contempt. If the state court has the power and authority to *compel* the attorneys of the non-resident creditor to dismiss his suit pending in the circuit court of the United States, it has the power and authority, for all *practical* purposes, to repeal and render nugatory that provision of the federal constitution and the acts of congress which secure to the non-resident creditor the right to sue a citizen of Georgia in the circuit court of the United States. The constitution of the United States, and the laws of the United States enacted in pursuance thereof, are the supreme law of the land, and no department of the state government has the power, either directly or *indirectly*, to violate or defeat that supreme law of the land. In my judgment, the court below had no legal power or authority to order the attorneys of Trowbridge, Dwight & Company to dismiss their suit pending in the fifth circuit court of the United States, against a citizen of this state, in accordance with the constitution and laws thereof, to say nothing about the impropriety of interfering with the jurisdiction and business of that court by an order of the state court for that purpose. I am, therefore, of the opinion that the judgment of the court below should be reversed.

CASES
IN THE
HIGH COURT
OF
ERRORS AND APPEALS
OF
MISSISSIPPI.

HEMINGWAY, adm'r, plaintiff in error v. SCALES.

(48 Miss. 1.)

Husband and wife — conveyance of land to — Tenants by entirety.

When land is conveyed to husband and wife each takes an entirety, notwithstanding a statute providing that all conveyances of land made to two or more persons shall be construed to create estates in common and not in joint tenancy.

THIS was an action of ejectment.

It appears from the record in this case, that on the 11th day of January, 1858, Augustus O. Winn and Ann J. Winn, his wife, for a valuable consideration, sold and conveyed to W. N. Scales and M. J. Scales, his wife, and their heirs, a certain tract or parcel of land, situated on the Yazoo river, in the county of Carroll, in the state of Mississippi, and that the deed of conveyance was duly acknowledged; that the said W. N. Scales departed this life in the year 1864, intestate, and that the plaintiff in error was duly appointed administrator *de bonis non* of said Scales by the probate court of said county of Carroll, and that at the May term, 1867, of said probate court, the estate of the said W. N. Scales, deceased, was, by the said court, declared insolvent, and decreed to be sold for the payment of debts. And that on the 29th day of August, 1867, the plaintiff in error, as administrator, as aforesaid, instituted an action of ejectment

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in the circuit court of said county against the defendant in error, Martha J. Scales, to recover the possession of an undivided half of the land conveyed to her and her husband as aforesaid.

To this action the defendant appeared and pleaded not guilty, upon which the cause went to trial, which resulted in a verdict and judgment for the defendant. From this judgment the plaintiff brings the cause into this court by writ of error, and makes the following assignments of error:

1. The court erred in refusing the instructions asked for by the plaintiff.

2. The court erred in overruling the plaintiff's motion for a new trial.

It is agreed by the parties to waive the question of the right of the plaintiff to bring the action of ejectment, and that the effect of the conveyance to the defendant and her husband shall be the sole question presented for the decision of this court.

B. R. Mayes and Geo. L. Potter, for plaintiff in error.

J. Z. George, for defendant in error.

PEYTON, J. The first error assigned is the refusal of the court to give the following instruction: "Tenancy by the entirety does not exist under the laws of Mississippi; and if the jury believe, from the evidence, that the deed conveying the tract of land mentioned in the declaration was made to W. N. Scales and wife jointly, then said Scales and wife took said land as joint tenants at common law, and not as tenants of the entirety, and consequently on the death of W. N. Scales, intestate, his half interest descends to his heirs, and does not survive to his wife; and on this state of facts, if the jury believe they exist, they will find for the plaintiff."

The common law forms the basis of our system of jurisprudence, and remains in force until repealed, changed or modified by statute. It clearly recognizes the distinction between the estates of joint tenants and that of husband and wife upon a conveyance to them. In the case of joint tenants in fee simple, each would have a right, without the consent of the other, to dispose of an undivided moiety of the inheritance. But in the case of a conveyance of land in fee simple to a man and his wife, they take not by moieties, but by entirety; and while the husband may do what he pleases with the rents

and profits during coverture, he cannot dispose of any part of the inheritance without his wife's concurrence.

It is insisted by counsel for the plaintiff in error, that the common law, in this respect, has been changed by our statute, which provides that "all conveyances or devises of lands made to two or more persons, shall be construed to create estates in common, and not in joint-tenancy, unless it shall manifestly appear, from the tenor of the instrument, that it was intended to create an estate in joint tenancy, with the right to the survivor or survivors." Rev Code, 309, art. 18. This provision, however, does not apply to conveyances made in trust.

The evident purpose of this statute was to abolish the *jus accrescendi*, the right of survivorship,—the distinguishing feature of joint-tenancy,—so that the estate of the joint-tenant, upon his death, might descend to his heir, as in case of tenancy in common. It merely converted a joint-tenancy into a tenancy in common. It made no change in the law with regard to the estate of husband and wife, which, as has been seen, is a very different estate from that of joint-tenancy. It, therefore, does not apply to conveyances to husband and wife, which, in legal construction, by reason of the unity of husband and wife, are not strictly joint-tenancies, but conveyances to one person. The husband and the wife are seized of the entirety, and the survivor takes the whole; and during their joint lives neither of them can alien so as to bind the other. Nor is such an estate, so held by husband and wife, affected by the statutes of partition. 4 Kent, 362.

In the case of the *Farmers and Mechanics' Bank of Rochester v. Gregory*, 49 Barb. 155, the court say that "it is a very clear proposition that our recent statutes for the better protection of the separate property of married women have no relation to or effect upon real estate conveyed to husband and wife jointly. In such a case the wife has no separate estate, but is seized, with the husband, of the entirety. Neither of them having any separate or severable part or portion, but the two, as one in law, holding the entire estate, neither can sell without the consent of the other; and the survivor takes the whole."

In the state of New York it has been decided that a statute, similar to our own, converting joint-tenancies into tenancies in common, does not apply to the conveyance of an estate in land to husband and wife. They are regarded in law as one person, and

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not as joint-tenants or tenants in common; and when one of them dies the whole estate created by such a conveyance remains in the survivor. *Wright v. Sadler*, 20 N. Y. 320, 323.

Our statute is applicable to such estates only as were held in joint-tenancy at the common law, and was not intended to affect conveyances to husband and wife; for the reason that the estate created by such conveyance is not, in legal contemplation, an estate in joint-tenancy, and for the additional reason, that such conveyance to husband and wife is not, in a legal sense, a conveyance to two persons, but to those who, for this purpose, are accounted but one person in law.

With a due regard to the rule that statutes in derogation of the common law are to be construed strictly, we think the statute cannot properly be construed to comprehend conveyances of land made to husband and wife. With respect to such estates the common law remains in force, unaffected by the statute. *Brownson v. Hull*, 16 Vt. 309; *Needham v. Branson*, 5 Wedell's law, 426.

Under the conveyance in this case, the defendant in error, having survived her husband, is entitled to the whole estate.

There is no error, therefore, either in refusing the instruction asked by the plaintiff, or in overruling the plaintiff's motion for a new trial.

The judgment will be affirmed.

CASSELL, plaintiff in error, v. BACKRACK.

(48 Miss. 56.)

Confederate government—de facto as between its citizens.

B sued C. for taking and carrying away two bales of cotton. C. had purchased the cotton in 1864, at a regular tax sale made by a collector of taxes for the confederate states government for taxes due that government from B. Both parties were residents in and adherents to the confederate states during the war. *Held*, that B. could not recover.

The confederate states government was a *de facto* government so far as relates to its own citizens and adherents, and all consummated transactions under it between such citizens, not in conflict with the constitution and laws of the United States, will not be disturbed by the courts.

THIS was an action brought by Jacob Backrack against W. H. Cassell for taking and carrying away two bales of cotton on the 5th of June, 1865, belonging to said Backrack.

The facts are stated in the opinion.

John Handy and Semmes & Cooper, for plaintiff in error.

E. J. Bowers, for defendant in error.

JEFFORDS, J. The declaration in this case contains two counts. The first is in trespass, and alleges that Cassell, the defendant below, on the 6th day of June, 1865, with force and arms, broke and entered the close of one A. H. Dinkins, in police district number three, in Madison county, and took and carried away from said close two bales of cotton belonging to the plaintiff, Jacob Backrack, the same being of the value of \$500, and to the damage of the plaintiff in the sum of \$1,000.

The second count is in trover, and alleges, that, on the 5th day of June, 1865, the defendant wrongfully converted to his own use two bales of cotton belonging to the plaintiff, to the damage of the plaintiff in the sum of \$1,000.

Cassell, the defendant below, pleaded the general issue, defending the wrong and injury, etc., and giving notice that under his plea of the general issue he would offer in evidence on his part, that, at a tax sale regularly conducted by the confederate states government tax collector, for non-payment of certain taxes due the confederate

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states government by said Backrack on certain cotton, of which these two bales of cotton were a part, he, the said Cassell, purchased the said two bales at said sale, and paid for the same, he being the highest and last bidder for the said two bales of cotton; and that said sale took place on or about the 17th day of June, 1864. The defendant also gave notice of set-off, and accord and satisfaction. The cause was submitted to a jury, and they returned a verdict in favor of the plaintiff for the sum of \$151.90; and thereupon the defendant below moved for a new trial for the reasons stated in the record, and the motion having been considered by the court, said motion was overruled and judgment rendered on the verdict, in favor of the plaintiff, to which ruling and action of the court the defendant excepted, and tendered his bill of exceptions. To reverse which judgment this writ of error is now prosecuted. On the trial of this case in the circuit court, the following instructions were requested and given for the plaintiff:

1. "The court instructs the jury, that the sale by Gould to Cassell conferred on Cassell no title to the cotton in controversy, unless said sale was subsequently ratified by plaintiff, or his agent, Gazan."

2. "The sale by Gould to Cassell, as one then acting as an officer of the confederate states government, conferred upon Cassell no title to the cotton in question," etc. The giving of these instructions, and refusal of the court to grant a new trial, are assigned for error.

The official character of Gould, as the regularly authorized tax collector for the confederate states government, does not seem to have been denied or questioned at the trial; nor was any objection raised as to the regularity of the sale made by Gould as such tax collector. It is asserted and not denied, that the sale took place in June, 1864, while the confederacy remained intact, and its authority and power irresistible in the greater portion of the state of Mississippi. The proof shows that the sale was of two *particular bales of cotton, designated by number; that the purchase-money was paid in full by the purchaser at the date of the sale. Nothing further remained to be done by either party in order to confer a perfect and complete title to the property sold on the vendee.* As between the vendor and vendee this transaction was fully executed and closed, and the rights of the parties irrevocably fixed, when the purchase-money was paid. It can make no difference that the vendee allowed the cotton to remain at the place where he bought it, as, by leaving it there, it remained entirely at his own risk, and,

in contemplation of law, was in his constructive or actual possession from the date of the sale. It is alleged by the plaintiff below, that the defendant below, when he removed the cotton which he bought, took one wrong bale, but there is no legal proof on this point whatever in the case. In the absence of proof we are bound to presume that he removed the *precise* two bales of cotton which he purchased, as the law never presumes the commission of a trespass or wrong.

It is a conceded fact, that both Backrack and Cassell were residents within, and adherents to, the confederate states government, during the continuance of the late rebellion. Backrack now, however, that he has played and lost, insists that the confederacy never was a government at all, not even so far as its own subjects and adherents were concerned, and, as a necessary legal consequence, never had any authority to impose and collect taxes from its own citizens.

The question at once arises, What was this so-called confederate states government? Was it in all respects, and for all purposes, a disorganized mass, a disorderly and irresponsible mob? Or, rather, was it not for certain purposes, and with reference to certain persons and parties, a government in fact for the time being?

We are well aware that in respect to the United States government and its loyal citizens this is now no longer a question open for discussion. It is now fully and finally settled by every department of the federal government, beyond all future controversy, that in relation to the United States the late confederacy was not a government either *de jure* or *de facto*, within the meaning of these terms as used in the law of nations.

The pretensions of nationality set up by the confederacy were most steadily and constantly denied by the United States, from the beginning to the close of the recent civil war. This was the very point in issue. It was the great central subject-matter of controversy between the contending parties.

The policy adopted by the United States government, and all the several departments, in all its dealings with this question, in whatever form or shape it presented itself, was adhered to and pursued with a tenacity of purpose which challenges the admiration of the world. It was never relinquished or even lost sight of for a single moment of time. It was maintained with a firmness and consistency unparalleled in the political history of nations, reaching the sublime in statesmanship. But does it necessarily follow, that,

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because the pretended confederate government was no government so far as the United States and its loyal citizens were concerned, it was no government as to those who organized, put in motion, and adhered to its fortunes during its continuance? We think not. It is well known that, after the breaking out of hostilities, those who resided within confederate territory not only acknowledged allegiance to the established central government, but with an unanimity and alacrity never before recorded in history, an entire people rushed to the support of the confederate standard. The old state governments were overthrown, and, speaking from the federal stand-point, usurping governments were erected in their stead, and the confederate states government, with sovereign power over all the eleven seceding states, was formed by the almost unanimous voice of an entire people. These governments, both state and central, were maintained and adhered to, for a period of more than four years, with unmatched devotion.

During all this time the internal and domestic concerns of life and business flowed on in their accustomed channels. Transactions involving thousands of millions of dollars had been fully consummated; innumerable contracts entered into and executed by the parties in interest; thousands of persons united in marriage, and children born of such marriages; the reaper death having been unusually busy during this period, had "heralded his millions to their homes in the dim land of dreams;" estates of decedents and minors had been administered; real estate and personal property of countless value had changed hands; courts were held, judgments rendered, and decrees pronounced and executed,—between the commencement and close of the war, under the assumed sanction of government and law.

We cannot now imagine any just political reason, or sound principle of state policy, which demands that we should hold, that, as between the citizens of the confederacy and the confederate states government, there was no government whatever. This tribunal will take judicial notice of the fact as a matter of public notoriety and history, that the inhabitants of the confederacy were not reduced to an absolute condition of barbarism, anarchy and chaos during the continuance of the rebellion.

We are inflexibly averse to harrowing up the bones and ashes of the late unfortunate civil strife. Whenever we can do so, without departing from the straight path of duty, we feel constrained not

to disturb their repose. Not by any word or deed of ours would we knowingly renew or perpetuate a single unpleasant recollection of the deplorable past.

Whi'e we admit that the public policy of the United States government holds that the confederacy and the state governments organized thereunder were unlawful combinations, and their acts illegal and void so far as they affect that government and its loyal citizens, still in reference to all matters of internal, private and domestic import, indifference to the government and laws of the United States, we are satisfied it is our duty to hold, that, so far as the inhabitants of the confederacy were concerned, it was a government in fact for the time being, for the purpose of conserving fully the private rights of persons and property, and for the protection of individuals from liability and punishment for obeying the laws of such government. To hold differently, would overturn, without particularizing, almost every transaction, whether of a public or private nature, which transpired during the supremacy of the confederacy, and would lead to consequences productive of incalculable mischief.

On the other hand, we believe we can see many satisfactory and controlling reasons why, as between the parties to, and the citizens of, the central and state governments composing the confederacy, they were governments in fact, in all matters relating to their internal domestic affairs; and especially should this be so with reference to past and executed transactions.

We are of opinion that for reasons of public policy alone, if for no other, the courts of the country should withhold their active interference in all such cases. If it be true, as we have attempted to demonstrate (and we are confident we have made no mistake in this), that the confederate states government, and the several state governments composing the central power, were "unlawful combinations of persons," confederating together for illegal and criminal objects merely, it seems to us that it follows irresistibly that all who formed part of and adhered to these unlawful organizations were not only *particeps criminis*, but were in a strict legal sense *in pari delicto*, and that, therefore, as between all parties standing in this relation to each other, the courts of the legitimate government, when restored, upon well-established and familiar principles of law, should deny their active aid to either party, and leave them in the exact condition in which they find them.

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We are not aware that this question has been the subject of judicial investigation either in the federal or state tribunals of the country; and it is a matter of regret that we have not been able to fortify our position by precedent and authority. We have, however, arrived at the present conclusion after the most careful and deliberate consideration, in full view of the vast importance of the question to be determined.

There is nothing in the position assumed in this case in conflict with the principles intended to be discussed and adjudicated by the opinion of the court of the present term, in the case of *Samuel B. Thomas, sheriff, etc., v. William B. Taylor, post.*

In that case, the subject-matter of the controversy was *executory*; whereas, in the case at bar, it had been wholly *executed*.

This opinion is designed to be limited in its bearing to matters and transactions not affected by the constitution and laws of the United States, and which have been *entirely consummated*, by the confederate states government upon its own citizens, or to subjects of controversy arising between such citizens and executed by them, during the time when that government was claiming to exercise, and in point of fact did exercise, sovereign power over the territory within its control.

For the reasons here stated, we are of opinion that the instructions given by the court below were erroneous. Its judgment must, therefore, be reversed, the verdict set aside, a *venire de novo* awarded, and the cause remanded.

RICHARDSON v. BORDEN, plaintiff in error

(43 Miss. 71.)

Fixtures—cotton gin.

As between the vendor and vendee of lands used in growing cotton, a cotton gin-stand, put up after the usual manner for use on the place, is a fixture, and passes with the land.

THIS was an action of replevin brought by Thomas J. Borden, the defendant in error, against William H. Richardson, the plaintiff in error, to recover a gin-stand, alleged to be of the value of \$175

The case was submitted to the circuit court on the following agreed case:

"In this case it is agreed between the parties that the court decide the question involved in this suit, upon the following agreed facts, and render its judgment accordingly, which are as follows, to wit: That Richardson bought a tract of land in said county, on which was a gin-house, in which the gin-stand in controversy stood, as gin-stands usually stand for use, and was the only gin-stand on the place, and worth \$175; that Borden made and delivered to Richardson a deed for the land, and Richardson took possession of the premises under it, and that there never was any reservation made of the gin-stand at the sale and execution of the deed; and the court shall decide whether or not the said gin-stand passed to Richardson by said sale and conveyance."

These facts being submitted to the court, the court determined that the gin-stand did not pass by the sale to Richardson, and that Borden was entitled to recover. And thereupon the court rendered judgment in favor of Borden. To reverse this judgment, the present writ of error is prosecuted. The only error complained of is, that the court below erred in giving judgment for the plaintiff on the agreed statement of facts.

W. Harper & Shelby, for plaintiff in error.

Mayers & Lowry, for defendant in error.

JEFFORDS, J. The sole question, then, for the court to pass upon is, whether or not, under the agreed case, the gin-stand was a *fixture*, and whether the title to the gin-stand, in this instance, passed by the deed which conveyed the title to the real estate. It has been a matter of almost universal complaint among lawyers, judges and writers on jurisprudence, that the law in relation to fixtures is, perhaps, less susceptible of being reduced to positive and uniform system than any other branch of legal science. There has been more judicial legislation on this subject, and the rules are less certain and fixed, than any other department of the law with which we are familiar. We do not wish to be understood as intending to say that the law is entirely unsettled, for we have many well-defined rules on this subject; but simply as saying, that what is or is not a fixture seems to depend on the peculiar facts and circum-

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stances surrounding each particular case, more than any other consideration. A thing or article may have been regarded as a fixture under one state of facts, and the same thing has been held not to be a fixture under another state of facts. Take, for instance, the article of manure, where by the sale of agricultural lands, and whether in heaps or scattered in the barnyard, it is a fixture, and passes as a part of the realty to the vendee; but when upon lands in a village or city, where the lands are not used for agricultural purposes, it is not a fixture, and is treated as personal property. It will be found upon examination that, in determining the question whether a thing is a chattel or fixture, reference must be had to the *nature of the thing itself*; the position of the party placing it where found; the probable intention in putting it there, and the injury which would result from its removal; and we must also consider the object of the party in placing the article on the premises with reference to trade, agriculture or ornament. In the present case, for example, the article in controversy was in its very nature adapted to the business for which the lands were used. The party who annexed it when he put it there must have intended it should remain as long as it continued serviceable, as the convenience and usefulness of his cotton plantation would have been seriously impaired by its removal. The gin-stand is not only a highly necessary article, but may be declared to be an indispensable one.

The doctrine is well established that, as between executor and heir, the vendor and vendee, mortgagor and mortgagee, the strict rule is applied in favor of the heir, vendee and mortgagee, holding many articles to be fixtures, and as belonging to the freehold, which would not be so as between landlord and tenant. In one class of cases the rule of construction is rigorous and stringent, in the other it is relaxed and liberal. This precise question seems never to have been passed upon by this court, but we find many decisions in the cotton-growing states; and as far as our examination has extended, these decisions have all been in one direction.

In South Carolina, in the case of *Farris v. Walker*, 1 Bailey (S. C.), 540, the plaintiff sold and conveyed his plantation to the defendant. Cotton was grown on this plantation and a cotton gin was in the gin house on the premises, attached to the gears. Plaintiff brought an action of trover for the gin, but the court were of opinion that it was a fixture and passed with the freehold. The court say: "The rule on the subject, as between the heir and executor, or

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between vendor and vendee, is more rigorous than between landlord and tenant, or the executor of a tenant for life, and the remainderman. In relation to the former, all things which are necessary to the full and free enjoyment of the freehold, and which are in *any way attached* to it, are held to be fixtures, and pass with it. What ought to be considered a fixture depends materially upon the nature of the freehold sold. If a plantation, then all such things attached to the land which are usually necessary, or used in the management of a farm, would pass."

This authority is directly in point. This doctrine was re-affirmed in the state, in *McMenna v. Hammond*, 3 Hill (S. C.), 331. The same rule is laid down in Alabama, in the case of *Bratton v. Clawson*, 2 Stewart, 478. The same principle has been followed in Tennessee, in the case of *Degrafenreid v. Scruggs*, 4 Humph. 451.

It seems to us, therefore, that it is clear from the authorities here cited, as well as upon reason, that the gin-stand in this case, standing as gin-stands usually stand for use, being the only one on the place, and no reservation having been made at the time of sale or delivery of possession of the premises, was a fixture and passed with the title to the realty.

The judgment of the circuit court is reversed, and this court will proceed to enter such a judgment here as should have been rendered in the circuit court.

BRIDGES, plaintiff in error, v. WINTERS.

(42 Miss. 131.)

Promissory note — alteration after delivery.

In an action by the administrators of the payee of a promissory note made in 1859 and payable "in gold" against the sureties thereto, the latter interposed the defense that the words "in gold" were inserted by the payee without their knowledge or consent after delivery. *Held*, that the alteration did not change the legal liability of the sureties, and that they were therefore liable.

THIS was an action in assumpsit on a promissory note of which the following is a copy:

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\$1,000.

"Twelve months after date, we, or either of us, promise to pay to John Winters, or bearer, the sum of one thousand dollars, loaned money ('in gold') with interest at ten per cent per annum: this 26th day of May, 1859.

"ROBERT M. HARRIS.
EZEKIEL J. BRIDGES.
JESSE G. KIMBROUGH
A. S. HAMILTON.
JAMES HUBBERT."

The defendants, Bridges, Hamilton and Hubbert, alleged in defense in their third plea, that they signed the note as sureties, and that after their signature and delivery the note had been altered without their knowledge or consent by interlining upon the face of it the words "in gold." This plea was demurred to and the demurrer sustained. As the other pleas relate to matters of practice we shall not allude to them.

Turner Groves & Turner, for plaintiff in error.

J. Niles, for defendant in error.

SHACKELFORD, J. There are five assignments of error made by the plaintiffs in error. We shall notice them in their order. The first is that the court erred in sustaining the plaintiffs' demurrer to defendants' third plea. The demurrer admits the allegations of the plea. What are they? That the words "in gold," as they appear in the note sued upon and set out herein, were inserted after the execution and delivery of the note to the deceased John Winters; and that the alteration was done without their "privity or consent, authority or acquiescence." Admitting, for the purpose of this discussion, that the alteration was made by John Winters, the payee of the note, is it such an alteration as will vitiate the note? The rule is well settled, that where any alteration is made which causes the instrument to speak a language different, in legal effect, from that which it originally spoke, it is a material alteration. Does the alteration in the case before us come within this rule? We think it does not. The note bears date on the 25th day of May, 1859; the drawers promise to pay \$1,000 twelve months after the date thereof, with ten per cent interest, the consideration being for "loaned money."

The legal liability of the plaintiffs in error, on the note in question, seems to us the same without the words "in gold" inserted as

with them. The law, at the date of this note, fixes the legal liability of the plaintiffs in error as to the kind of funds or money this note should be paid in. They admit the consideration was for loaned money to Harris, the principal. Could Harris legally discharge or pay the money due on the note on the 25th day of May, 1860, in any other currency than gold? He could not.

View this alteration as an alteration by John Winters, it only expresses what the law implies, and only shows what the law would do if resistance was made to the payment of the note; the alteration, then, if we are right in our views of the rule, was an immaterial one, not changing in the least the legal liability of the parties to the note (*Falmouth v. Roberts*, 9 M. & W. 469; 5 Mass. 540; 6 id. 519), and the law itself would supply. 15 Pick. 239; 3 Ohio Stat. 445.

The rule is different when the alteration has been made fraudulently, or with a fraudulent intent; but there was no allegation in this plea that the alteration was made with such intent, or that it had been made by Winters, the payee. It is manifest that the insertion of the words "in gold" was inserted to show the kind of money loaned to Harris, the principal, and was to create a higher security, or to fix a greater liability to the parties to the note. The plaintiffs in error do not show by their plea that any other kind of goods were loaned to Harris than gold. The proof to the contrary, if any existed, was in the possession of the plaintiffs in error at the filing of their plea; and their failure to allege that any other kind of funds were loaned is conclusive against them that it was gold loaned.

If we are right in this view of the facts touching the consideration of the note, the payee, if he made the alteration, was only supplying an omission which was not material, and could in no wise affect the rights or liability of the plaintiffs in error upon the note.

Another view of this question: There is a distinction to be observed between an *alteration* and a *spoliation* of an instrument, as to the legal consequences. An alteration is an act done upon the instrument by which its meaning or language is changed. If what is written upon, or erased from, an instrument has no tendency to produce this result, or to mislead any person, it is not an alteration. This term is applied when the act is done by the party entitled to the instrument. But the act of a stranger, without the participation of the party interested, is a mere spoliation or mutila-

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tion of the instrument, not changing its legal operation, so long as the original writing remains legible.

There is no allegation in the plea in question that the insertion of the words "in gold" into the note was made by the deceased payee. These words may have been inserted by a stranger. If this alteration was material, and was shown by the plea to have been done by the deceased, it would have been repugnant to all principles of justice for the court to have overruled the demurrer to this plea, it being beyond the power of the administrator of the deceased payee to explain how, when, or by whom, the alteration was made.

We concur with the learned judge in his view of the legal effect of the allegations of the plea in question, and see no reason to disturb the judgment or the demurrer.

(The remainder of the opinion relates to questions of practice.)

Let the judgment be affirmed.

BOWEN, appellant, v. BAILEY.

(43 Miss. 405.)

Covenant on sale of lands

In a contract for the sale of land the vendee agreed to pay the purchase-money in installments, and the vendor executed a bond conditioned to deliver the deed upon the payment of the last installment; *held*, that the covenants were independent and that the vendor might enforce payment of all the installments without first tendering a deed. See *Robinson v. Harbour*, *post*, where a contrary doctrine is held by the same court.

At the October term, 1866, the appellees filed their bill in the chancery court of Washington county against appellant, and alleged therein that Mrs. S. A. E. Bailey, during the life-time of her first husband, Richard Griffith, and together with him, made a contract for the conveyance of certain lands, on the 7th of November, 1856, with appellant, which land was owned by Mrs. Bailey, then Mrs. Griffith, in her own right. By this contract appellant was to make and deliver four promissory notes, each for the sum of \$3,505, maturing at one, two, three and four years from date of the contract, and was further to pay those notes promptly as they matured.

Upon the payment of these notes Mrs. Bailey and her first husband, Richard Griffith, were then to make him a title to the land — a full warranty deed in fee-simple.

Under this contract appellant was put in possession of the land, and continues now to occupy and enjoy the same. Appellant has failed and neglected to comply with his part of the contract, and said notes, or a large portion thereof, are still due and unpaid. Mrs. Bailey avers that she has at all times been ready and willing to execute a deed to the land, as stipulated for in the contract, whenever appellant complied with his precedent obligation. Appellees tender with the bill a deed to the land, and pray that the money due on the notes be decreed to be paid, and in default of payment that the land be sold for the payment of the notes. The bond for sale and conveyance of the land, with the four notes of appellant, are made exhibits, and filed with the bill. There was a demurrer to the bill. The grounds alleged are:

1. That there is no equity on the face of the bill.
2. The bill does not aver or show that a deed was tendered by complainants (appellees) prior to the filing of their bill, etc.

The demurrer was overruled, on the ground that the conditions of the contract were mutual and independent. Leave given to answer. At the November term, 1867, a *pro confesso* was taken, and a final decree rendered, on proof, and commissioner's report for \$12,772.10, ordering sale of the land to pay this sum. From this decree the court granted an appeal to this court. The error relied upon is, that the court erred in overruling the demurrer to the bill.

Newgent & Yerger, for appellant.

Johnston & Johnston, for defendant.

SHACKELFORD, C. J. The only question involved in this assignment of error is, whether the covenants in the contract set out in the bill of appellees are mutual and independent, or dependent. Counsel for appellant admit in their argument that "the notes, considered by themselves, constituted a separate independent contract, and that they could have been sued upon as they fell due;" but says, "when a bill for a specific performance of an agreement is brought, the case is *entirely different*."

If the covenants of the contract were mutual and independent, as counsel clearly admits, how are they changed when a bill for

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specific performance of the contract is filed? Counsel answer, that, inasmuch as *all the notes had matured before the institution of this suit*, thereby the notes were merged into one debt, and the case falls within the rule laid down by this court in the case of *Eckford et al. v. Halbert et al.*, 30 Miss., and that the appellees should have placed appellant "in default anterior to the filing of their bill." In the case of *Eckford et al. v. Halbert et al.*, there was but *one* note executed by the vendee, and the vendor obligated himself to make title when the purchase-money should be paid; the court holding in that case, "that the covenants to make title, and to pay the money, are concurrent," and that a tender of a deed to place the vendee at fault before suit was necessary. We must dissent from the view taken by counsel of the effect of the non-payment of the notes, when they became respectively due, upon the covenants in the contract; if they are mutual and independent by the terms of the contract in question, we are unable to perceive by what process they can be altered by the default of the appellant in not paying them as they fell due. In support of this position of counsel, that the debt being all due before the institution of the suit upon the contract, etc., the four notes were merged into one debt, and the covenants thereby became mutual and dependent, we are cited to the case of *The Bank of Columbia v. Hayner*, 1 Peters' S. C. 455. We have examined this case with care; it seems to favor this assumption of counsel. But, upon a critical examination of the facts of the case, we find that there was a question of great doubt whether there was a contract at all upon which a suit could be founded. The court saw proper to consider *there was a contract*, and decided the case upon that assumption. There was a sale by the bank to Hayner of the lots, and the purchase-money was to be paid in six quarterly installments, for which he would give his notes to the bank if the bank would give him a deed; and if the bank preferred it, he proposed to pay in installments, and take a bond for title when all the payments were made. No part of the purchase-money was paid. *There was no bond for title, or notes executed.* The suit was at law upon the contract, *as understood* between the parties.

The court held that in contracts for the sale of lands the covenants should *be considered mutual and dependent*, as courts favored that construction, unless the contrary appeared from the contract; and they considered the contract before them *showed* the intention

of the contracting parties that the covenants *should be mutual and dependent*. The court holding that the bank was bound to perform their correlative part of the proposition, by either making a title and tendering it to Hayner on the day when the last payment was considered due and payable, or by giving the bond for title, in accordance with his demand and the promise of the bank. It must have been on these grounds that the court held that the covenants were mutual and dependent, although Hayner had agreed to pay the bank by installments. If this were not so, this decision is irreconcilable with the authorities cited in the case. In the case under consideration the parties to the contract have shown their intention clearly. Bowen gave his four notes, payable in one, two, three and four years, for the sum of \$3,505 each, and received the bond for title of appellee and her husband, Richard Griffith, when the purchase-money should be paid. Bowen clearly manifested his intention to pay three-fourths of these notes to the vendors of the land, without requiring from them the performance of any condition precedent. Appellant, as shown by the record, has paid part of the purchase-money to the vendors, thus furnishing indisputable evidence of his intention to pay his money without asking for or getting a title. If this was not his first intention, he has failed to prove by his subsequent acts that it was not.

There can be no question regarding the character of the covenants in the contract under consideration; they are mutual and independent. The facts of the case are similar to those in the case of *Clopton v. Bolton*, 23 Miss. In that case an action at law was instituted upon the writings obligatory, payable in twelve and twenty-four months after date, given for the purchase-money of a tract of land. The defendant pleaded that fact, and that the plaintiff, at the date of the contract, executed and delivered to the defendant a bond to make title to the land when the purchase-money should be paid; and that the plaintiff did not, before the bringing of the suit, tender a deed to the defendant for the land.

The court expressly re-affirms the cases of *Gibson v. Newman*, 1 How. 341; and *Coleman v. Rowe*, 5 id. 460; and holds that, "as on the one part there were instruments for the payment of the purchase-money at several different periods, and on the other an obligation to make a title on full payment of the purchase-money, it is clear, beyond doubt, that the covenants were intended to be inde

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ing, in *McMath v. Johnson*, that the covenants of the contract were independent.

The facts of the case before us are scarcely distinguishable from those of the case of *McMath v. Johnson*; in both cases all the notes given for the purchase-money had matured *before suits were instituted upon the notes*.

Recognizing and adhering to the doctrine, as finally laid down in *McMath v. Johnson*, we think the demurrer to the bill of appellees was properly overruled by the chancellor, and the decree should not be disturbed.

The question involved in this case having undergone repeated and thorough investigation by this court, we think it ought now to be considered decisively settled, in this state at least.

Let the decree be affirmed.

IVEY, plaintiff in error, v. LALLAND.

(42 Miss. 444.)

Contracts—Confederate money—Lex loci contractus.

In an action on a note given in Louisiana for a loan of confederate money *held*, that the courts of Mississippi would not enforce the contract, since the courts of Louisiana had declared all contracts, the consideration of which was confederate money, illegal and void.

THE defendant in error instituted suit against the plaintiff in error on a promissory note made by him in favor of the defendant in error for the sum of \$4,355, dated New Orleans, the 5th of April, 1862, and payable twelve months after date.

The defendant below appeared to the action and pleaded four special pleas, of which the fourth plea alleges that the note sued on was made at New Orleans, in the state of Louisiana, and payable twelve months after the date thereof, at the office of the plaintiff below in said city, for and in consideration of the treasury notes of the confederate states, commonly known as confederate money, amounting on their face to the sum of \$4,000; that the sum of \$355 in excess of said sum was the interest upon said \$4,000, for one year, for the loan of said treasury notes.

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defense to the action, and that the court below erred in sustaining the demurrer to it.

It has been repeatedly held by the court of last resort in the state of Louisiana, that the issue of confederate treasury notes was illegal, and the notes void, and formed no valid consideration for a contract; and that a contract, the consideration of which is confederate treasury notes, is illegal, and against public policy, and will not be enforced in that state. *Hemly v. Scott*, 19 La. An. 161; *Reeve v. Doughty*, id. 164; *Graves v. Hardesty*, id. 186; *Washburn v. Offert*, id. 269; *King v. Huston*, id. 288; and *McCracken v. Poole*, id. 359.

For these reasons the judgment will be reversed, and the demurrer to said plea overruled; and this court, proceeding to give such judgment as the court below ought to have given, do order and adjudge that the plaintiff below take nothing by his writ, and that the defendant below go hence without day, and that he have and recover of and from the said plaintiff his costs.

SHACKELFORD, C. J., dissenting.

MISSISSIPPI AND TENNESSEE RAILROAD COMPANY, plaintiff in error, v. DEVANEY.

(48 Miss. 555.)

Railroads — re-location of road — trespass under claim of title.

A railroad corporation, authorized by its charter to take the lands of private parties for its road, does not exhaust its power by once locating its road; but in case of necessity, may re-locate it and take private property for the purpose.

A party entering upon land in good faith, under the belief that he has the title thereto, is not a naked trespasser, though the title be in fact in another; and he is entitled to all legal protection to his improvements and property placed upon the premises, given by the statute to parties in possession under color of title.

THE facts are fully set forth in the opinion.

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White & Chalmers, and Clapp, Vance & Anderson, for plaintiffs in error.

Walthall & Golladay, and W. & J. R. Yergor, for defendants in error.

SHACKELFORD, C. J. The first case, No. 11,057, is an action of ejectment; the second, an appeal from the verdict of a "jury of review," to condemn and assess damages for the right of way for a road-bed of five-eighths of a mile, from the line of the old road-bed of the Mississippi and Tennessee Railroad Company, to connect with the track of the Mississippi Central Railroad Company, on the north side of the Yallobusha river. The same questions are involved in both cases, and by desire of counsel they will be decided together. The jury in the ejectment case found a verdict for the defendant in error, and judgment was rendered upon it. In case No. 11,058, they found a verdict for \$3,600, in favor of the defendant in error. A motion for a new trial was made in each case, assigning the same grounds in each case.

1st. Because the court erred in giving plaintiffs' charge No. 2.

2d. For error in the court in refusing defendant's charges.

3d. Because the jury found contrary to law and evidence.

During the progress of the trials, exceptions were taken to the rulings of the court in granting the instructions asked by defendant in error, and to the action of the court in refusing those of the plaintiff in error. These rulings of the court are made grounds of error in this court. All the testimony (an agreed state of facts) is also embraced in the bill of exceptions taken to the rulings of the court in refusing new trials. Which testimony, or agreed state of facts, is, in substance, that the Mississippi and Tennessee Railroad Company was chartered by an act of the legislature of the state of Mississippi on the 16th day of October, 1852, and by the terms of its charter authorized to construct a railroad from some point on the northern boundary line of the state through certain counties, "and to connect with the Mississippi Central railroad at such point as they may elect."

The company were empowered by their charter to enter upon and condemn land of private parties for the purpose of procuring the right of way, when the same could not be obtained by consent of the land owners, and the manner of obtaining such condemnation,

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by jury of review, was prescribed. The company selected the town of Grenada, being immediately upon the south bank of the Yallobusha river. A bridge across said river was erected, a few hundred yards from a similar structure belonging to and used by the Mississippi Central Railroad Company. The road-bed and bridge thus erected were continually used from the completion thereof until the month of June, 1863 (having been used for two years), when the bridge of the Mississippi and Tennessee railroad and the Mississippi Central railroad were both burned by military forces. After the close of the late civil war, both companies being in embarrassed circumstances, occasioned by the loss of their bridges and their rolling stock, etc., they resolved to build a joint bridge or partnership bridge over the Yallobusha river at Grenada, upon the piers of the Mississippi Central Railroad Company, with the permission from said Mississippi Central Railroad Company to the Mississippi and Tennessee Railroad Company to run their cars over the track of the Mississippi Central road, a few hundred yards north of the Yallobusha river, for the purpose of crossing the river upon said partnership bridge. To effect this object it became necessary for the Mississippi and Tennessee Railroad Company to *deflect* from their former track on the north side of the Yallobusha river, and to have the right of way to build a new track about five-eighths of a mile, to enable them to connect their rails with those of the Mississippi Central railroad.

Jenkins Devaney, the defendant in error in the case before us, is the owner of the land lying between the two roads through which the Mississippi and Tennessee Railroad Company proposed to build their new or connecting track.

Devaney and the plaintiff in error could not agree upon the price for the land upon which the road-bed for the track had to be constructed. Consequently the Mississippi and Tennessee company, upon the 11th day of November, A. D. 1865, in the mode pointed out by their charter, caused a jury of review to be summoned; who, after inspection of the land surveyed for the new track, condemned the same to the use of the company, and assessed the damages to be paid to Devaney therefor at \$300. This amount the Mississippi and Tennessee Railroad Company, on the 14th of November, 1865, tendered to the said Jenkins Devaney, who refused to receive the same; proof of the tender to Devaney appearing in the record. No

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further action was taken at that time by the Mississippi and Tennessee Railroad Company.

On the 21st of November, 1865, the legislature of this state passed an act amendatory of the charter of the plaintiff in error, whereby they were specially authorized to make a connection with the Mississippi Central Railroad Company, on the north side of the Yallobusha river. A few days after the passage of said amendatory act, without any new survey or jury of review or condemnation, the company entered upon the land originally surveyed, and condemned by the jury of review on the 11th day of November, A. D. 1865, and for which they had tendered to the defendant in error the \$300.

On the 13th day of April, 1867, the defendant in error instituted, in the circuit court of Yallobusha county, an action of ejectment against the Mississippi and Tennessee Railroad Company, for the recovery of the land surveyed and condemned by the said jury of review on the 11th day of November, 1865, and upon which said company had, in the mean time, placed their road-bed, ties and iron rails, and upon which the cars of the plaintiff in error were then running.

Shortly after the commencement of the ejectment suit, on the 26th of April, 1867, the Mississippi and Tennessee Railroad Company had another jury of review summoned, who inspected and condemned the same land inspected and condemned by the jury of review of the 11th of November, 1865, and rendered a special verdict assessing the damages sustained by Devaney at the same sum which the former jury assessed — to wit, \$300. They state in their verdict, in addition, that they make this assessment under the impression that Devaney is not entitled to claim as damages the value of the road-bed, cross-ties and iron rails, which the company had laid down upon the land in question nearly two years before, and which the company were then using. "But if Devaney is entitled to claim said road-bed, cross-ties and iron rails as his property, that then they assess his damages at \$3,600 — namely, \$300 for *actual damages sustained*, and \$3,300 for the value of the road-bed, cross-ties and iron rails." From this verdict of the last jury of review Devaney appealed to the circuit court of Yallobusha county, and on the trial of this appeal the verdict of \$3,600 was rendered by the jury. Upon the trial of the suit for damages, the railroad company pleaded and relied upon the verdict of the "jury of review" of the 11th of November, 1865, and the condemnation

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of the land by the same, and upon the tender of the \$300 assessed by said jury on the 14th day of November, 1865.

The railroad company, by their counsel, asked the court to charge the jury, "that, in estimating the damage sustained by Devaney, they could not estimate as part of his damage the value of the cross-ties, iron rails and superstructure which has been placed upon the road-bed on said land by said company." This instruction the court refused to give. Exception was taken to this ruling of the court, and allowed.

At the instance of the defendant in error, the court gave the following instruction to the jury: "That they, the jury, might consider the value of the cross-ties, road-bed, and iron rails, in estimating the amount of plaintiff's damage." To the giving of this instruction, plaintiff in error objected, and excepted at the time. Upon the trial of the ejectment suit, as upon the trial of the suit for damages, the plaintiff in error pleaded and relied upon the tender of the amount assessed by the jury of review of the 11th of November, 1865, and upon their verdict of condemnation on the 11th of November, 1865, and upon the amended article of the legislature of the 21st of November, 1865, to their charter. The railroad company, by their attorneys, asked the court to give the following instructions:

1. "That if the jury believe that before the railroad company entered upon the land they tendered the amount of the verdict found, on the 11th day of November, 1865, to the plaintiff Devaney, they would find for the defendant."

2. "That if the jury believe that the defendant entered upon the land in November, 1865, and upon the 4th of September, 1867, tendered the plaintiff the amount found due on the 26th of April, 1867, they would find for the defendant."

3. "That if the jury believe that defendant entered upon the land under the charter and amended charter, and built their road, and were using it as a public railroad under said charter, they would find for the defendant."

All of which instructions were refused by the court, and exceptions were then taken to the ruling of the court. The court then, at the request of the counsel for the plaintiff Devaney, charged the jury, "that if the railroad company relied for defense upon the fact that the land had been condemned by a jury impaneled to assess

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plaintiff's damages, under the provisions of defendant's charter, then they must prove payment or tender of the amount found due."

The verdict for \$3,600 had been rendered against plaintiff in error previous to the trial of this, the ejectment suit; it evidently referred to this verdict.

The plaintiff in error assigns the following grounds for error in both cases:

1. Error of the court below in giving charges asked for the plaintiff.
2. Error in the court's refusal to grant charges asked for the plaintiff.
3. Error in the court's refusal to grant charges asked by the defendant.
4. Error in the court in overruling motions for new trials.

The first question raised and presented by counsel in the argument of the case is this:

Whether the connection made with the track of the Mississippi Central railroad north of the Yallobusha river is in violation of the charter of the Mississippi and Tennessee company, or whether the power to connect with the Mississippi Central railroad was exhausted by the connection at their depot in the town of Grenada, on the completion of their road in 1861.

It is contended by counsel for the defendant in error that the election by the plaintiff in error to locate their depot at Grenada, and their location of the same there, and their connection with said road at that point, exhausted their right, under their charter, to connect with the Mississippi Central road at any other point; consequently, that the connection last made by the plaintiff in error with the track of the Mississippi Central road north of the Yallobusha river is illegal and void.

The depot of the Mississippi and Tennessee Railroad Company in Grenada is at the same place where it was originally located, on the completion of their road to that point.

There has been no effort to change the depot, as shown by the proof in the case; all the plaintiffs in error attempted to do, and did do, was to reach their depot in Grenada, the terminus of their road, by connecting the iron rails of their road with those of the Mississippi Central track north of the Yallobusha river; by doing this they accomplished their object. They having sustained half the expense of erecting a bridge over said river, upon the piers of the

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Mississippi Central Railroad Company, they acquired a right to run their cars over said bridge, and over a few hundred yards of the track of the Mississippi Central road.

THIS connecting of the iron rails with those of the Mississippi Central road, as stated and shown by the diagram in the record, is not such a connection as was contemplated by the charter of the company; it is not the terminus of their road in a legal sense. There is no depot at the junction for the transfer of freight or passengers; their trains pass on and over the track of the Mississippi Central road, without obstruction, to their depot at the terminus of their road in Grenada. The proof shows, that before the late civil war the cars of the plaintiff in error entered their depot in Grenada *over their own road and bridge*. Their charter authorizes them to connect with the Mississippi Central road at such point as they might select, *where their road should terminate*. It will scarcely be denied that the plaintiffs in error had the right and the power, under their charter, to connect their rails with those of the Mississippi Central Railroad Company, at any point above Grenada they saw proper, with the consent of the Mississippi Central Railroad Company, previous to the construction and completion of their bridge over the Yallobusha river, and of their road to their depot in Grenada, and to run their cars over the track of the Mississippi Central Railroad to their depot in Grenada. If this position is correct, upon what ground can that right be controverted now?

Again, if the right of way had been purchased from the defendant in error, Devaney, over his land, as proposed by the plaintiffs in error, and the connection made, as it has been done, without opposition from Devaney, who could object to the running of their cars over their joint bridge and upon the track of the Mississippi Central road? It is only necessary to ask the question to obtain its answer. The position of track of the Mississippi Central road, over which the plaintiffs in error run their cars to their depot in Grenada, for all practical purposes is as much their road or track as if they had originally owned and constructed it. They have unrestricted use of it, in common with the Mississippi Central railroad; they own the bridge in common, and their legal right to the use of it is equal, in all respects, with that of the Mississippi Central. It only loses its identity as their road at the connection with the track of the Mississippi Central railroad, at the depot of the plaintiffs in error in Grenada. We think the objections urged by counsel

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against the legality of "the connection" under discussion are unsupported by facts, and are therefore without force; they are based upon the idea that this connection of the roads north of the Yallobusha river was a terminus of the road of the plaintiffs in error, when, in fact, the terminus, as the proof shows, is still at Grenada.

Counsel for the defendant in error contend, that the survey and condemnation of the land of defendant in error, Devaney, by the *jury of review*, on the 11th day of November, 1865, to the use of the plaintiffs in error, and upon which the plaintiffs in error have built a track from the old line of their road to the track of the Mississippi Central railroad, are illegal and void. And, in support of this position, insist that the plaintiffs in error exhausted the power conferred upon them by their charter, to take lands *in invitum* when they located their road and constructed it from Memphis, Tennessee, to Grenada, on the south side of the Yallobusha river, and rely upon the cases of *The Little Miami Railroad Company v. Naylor*, 2 Ohio, 235; *Morehead v. Little Miami Railway Company*, 17 id. 340; *State v. Norwalk and Danbury Turnpike Company*, 10 Conn. 157; *Griffin v. House*, 18 Johns. 397 (a turnpike case); *Louisville and Nashville Branch Turnpike Company v. Nashville and Kentucky Turnpike Company*, 2 Swan, 282; *Turnpike Company v. Hosmer*, 12 Conn. 364, and other authorities. This question of the power of railroad companies to take lands *in invitum*, for the purpose of relocating, repairing or altering their tracks or lines of road, is now, for the first time, before this court in the case now under consideration. The questions involved in the case have been elaborately argued by the counsel of both parties with great ingenuity and distinguished ability.

The first authority we shall notice, relied upon by counsel for defendant in error, is the case of *Morehead v. Little Miami Railway Company*, 17 Ohio, 340. The railway company, in this case, had located their road through a street in the city of Cincinnati, Ohio, and, when in *full operation*, it attempted to make a double track on a lot of a private individual, with a view of abandoning the line of track through the street. The court enjoined the company from further proceedings, giving as their reason for so doing, that "*there was no necessity for the change, and it was not a case for the exercise of any implied power,*" citing the case of *The Little Miami Railway Company v. Naylor*, 2 Ohio, and affirming it. It will be observed, from the language of the distinguished chief justice who delivered

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the opinion of the court in the case, there was "no necessity for the change;" clearly indicating thereby, that, if there had been a necessity for the change, the decision of the court would have been different. The facts of this case differ widely from those of the case under consideration: here, the bridge and the road over it had been destroyed by fire, and their depots *isolated from the terminus of their track on the north side of the Yallobusha river*. The cars were in full operation over their road, through the street, to their depot, in the case of the Little Miami railroad, and they sought to change their track, as a matter of convenience, clearly. There was no necessity for a change, or for the exercise of *implied powers*. It may not be amiss to state here that the decision in the Ohio case just referred to caused the passage, by the legislature of Ohio, of an act authorizing all railroad companies in the state, or to be constructed, the power to alter, relocate or repair their roads, by taking any lands they saw proper *in invitum*, upon the same terms specified and prescribed by their charters, viewing the decision of the court, in 17 Ohio, as oppressive and detrimental to the great railroad interests of that state. In the next case of *The State v Norwalk and Danbury Turnpike Company*, 10 Conn. 157, the court, in deciding that the company had not the right to change their toll-gates at discretion, after they had been located, uses this language: "As the power is not given to *commissioners*, but to *proprietors*, whose interests may not always coincide with the *convenience of the public*, to be exercised at their *discretion*, this authority ought not to be extended by construction." In this decision, the judge who delivered the opinion of the court gives as a reason for the determination of the court, that the rights of the public had to be considered and recognized; that by construction the company should not have their powers enlarged. The facts of the case showed there was no necessity for the change of gates.

The court, in the case of *Turnpike Company v. Hosmer*, 12 Conn. 364, affirms the case of *The State v. Norwalk and Danbury Turnpike Company*, 10 id., and uses this language: "The position of the gates upon a turnpike road is a matter in which the *company on one side*, and the public on the other, are deeply interested." "That property and dwelling-houses must be affected by such a change or alteration." "It may, indeed, be slight, but still it is entitled to the protection of the law against a trifling injury, unless a fair construction of the charter authorizes the company to inflict it." In

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the case of *Griffin v. House*, 18 Johns. 397 (a turnpike case), this language is used in the opinion of the court: "That, when the discretion had once been exercised, the power is exhausted, and cannot be revived, so *as* to authorize the company to change and move their gate to *suit their convenience, without some strong and manifest necessity to warrant it*; that the company had acted capriciously, and have *lost sight of the trust* reposed in them, by changing several times the location of the easterly gate, contrary to the *first opinion, and without any apparent necessity for it*."

The last case cited in this branch of the case before us, is *The Louisville and Nashville Branch Turnpike Company v. Nashville and Kentucky Turnpike Company*, 2 Swan, 182. The court, after holding that the company could not change their gate, because the change would affect the right of the *public*, uses this language: "When the charter vests corporations with discretionary power in reference to the exercise of a particular right, and in the exercise of this *discretion*, so conferred, they may make an election (place for a toll-gate), and this *election* is final and conclusive." "Notwithstanding this is so, however, the corporation may, if it chooses, abandon the use or enjoyment of the *rights secured by election, if no detriment thereby accrues to the public*."

The courts, in the cases of *Turnpike Co. v. Hosmer* and *Griffin v. House* recognize and affirm the rule contended for by counsel of defendant in error, but at the same time give their reasons for the enforcement of the same—that *there was no necessity* shown in either case for the changes of gates sought to be made by them; and that the changes, if made, would work injustice to the "*public*," who had rights that could not be invaded "*without a manifest necessity for such an invasion*."

In the case in 2 Swan, 182, last mentioned, the court gives the reason for the rule of construction contended for by defendant's counsel, in the remark that the corporation can "abandon the use or enjoyment of the rights secured by election, if *no detriment thereby accrues to the public*," thereby clearly intimating, that if *no detriment* should accrue to the "*public*" by a change of gates (the court evidently means, by the use of the word "abandon," that by the abandonment of one gate they had a right to erect another in its stead), the reason for the rule ceases; and that such alteration of a gate would be legal, although there was no delegated power in the charter to make an alteration, after once locating it.

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We can see no reason why railroad companies should not be permitted to alter the location of their depots and their tracks, when no detriment to the public ensues therefrom. If by the alterations the interests of the *public are subserved*, more strongly the reason why the rule contended for by counsel for defendants should not be enforced against them. Certainly it should not be done if the facts of the case under consideration show this was done.

Counsel for plaintiff in error cites us to the cases of the *N. O. Carrollton Railway Co. v. Second Municipality of New Orleans*, 1 La. An. 128; *Knight v. Carrollton Railway Co.*, 9 id. 284; in *Railway ex parte*, 2 Rich. (S. C.) 434; and *South Carolina Railway Co. v. Blake*, 9 id. 229; and rely with confidence upon these cases, as decisive of their view of the question under consideration.

In the first case above cited, the supreme court of Louisiana held that the Carrollton Railway Company, having a charter to construct a railroad between the town of Carrollton and the city of New Orleans, gave them the implied right or power to construct a *branch railway*, to a lot upon which they had erected a depot and turntable, in another part of the city of New Orleans, and off their direct line to their depot, as the terminus of their road.

The court uses this language in their opinion: "The right to establish such a depot results necessarily from the right to *establish and maintain the road*. Consequently, they had the right to run their branch road to it, without any direct authority in their charter authorizing the making of two depots, or a branch road to one of them."

This conclusion was arrived at, notwithstanding the objections here urged were made and argued with signal ability by the distinguished counsel for the city of New Orleans.

This case was afterward cited and affirmed in the case of *Knight v. Carrollton Railway Co.*, 9 La. An. 284, wherein the same questions were involved. This case has many of the leading features of the case before us.

The case of *Railway ex parte*, 2 Rich. 434, was an appeal from the court of common pleas, the petition of the railroad company having been denied by the court, for the reasons, "that if it can be shown that the company has no right to take the property, or where the *public necessity* is doubtful, in both of which cases law and right are concerned that it should not be taken." "The company not having the power to take the property of citizens at their discretion,

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and the *necessity* for the taking the lands of the respondent, for any of the purposes mentioned in the charter, not having been shown to the court, the motion to have commissioners appointed to survey the land and assess damages must be refused."

This order was reversed by the supreme court of South Carolina. Chief Justice RICHARDSON, delivering the opinion of the court, says: "The railroad company had the same power to acquire land, either by grant or by compulsory proceedings, for the purpose of *varying*, altering and repairing their road, as for the original purpose of locating and constructing it."

The same opinion was adhered to by the court in the case of the *South Carolina Railway Company v. Blake*, 9 Rich. 229, with a qualification of the rule adopted in 2 Rich., affixing conditions not affecting the principles upon which the cases were decided.

Counsel for defendant in error insists that the rulings of the South Carolina supreme court are anomalous, and "must be attributed to the *peculiar* laws of South Carolina, that private property may be lawfully taken for public use without compensation," "and should not be received as authority in a state with a constitution like ours."

Although it was decided in South Carolina that private property could be taken for public use, without compensation, in the case of *The State v. Dawson*, 3 Hill, 100, there being no provision in their constitution against such rights of the state, if the decision of the court is just, upon principle, it cannot be affected by the clause in the constitution of South Carolina referred to, because the charters of these companies contain provisions that the companies "shall not take private property without just compensation is first made therefor;" and the mode of obtaining private property, when the same cannot be purchased at private sale, is pointed out in their charter. No effort was made by the companies to obtain the lands of the parties resisting the right, other than by the manner provided therein.

By recurring to the proof it will be seen that the railroad of the plaintiffs in error had been completed for two years, when their bridge (a "costly structure") over the Yallobusha river was destroyed. At the same time (June, 1863) the bridge of the Mississippi Central road, over the said river, was destroyed by the military forces by fire. That, after the close of the war, both companies were so embarrassed by the loss of their rolling stock, and

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by the destruction of nearly all of their bridges, depots, etc., etc., that, neither company being able to build their bridge over the Yallobusha river, they determined to build a joint bridge on the piers of the Mississippi Central railroad bridge, left standing, which they did. Permission from the Mississippi Central Railroad Company to the plaintiffs in error was granted in this contract for the company to run their cars over a few hundred yards of the track of the Mississippi Central road, north of the Yallobusha river, for the purpose of enabling the plaintiffs in error to run their trains over the partnership bridge to their depot in the town of Grenada.

These facts show that rival railroad companies, who had no interests in common, were driven, from *necessity*, on account of their crippled finances, caused by the war, to *unite their limited means* for the purpose of *repairing their roads* in this particular. If either company could have erected a new bridge, there certainly would not have been a uniting of their means to build one bridge. If the Mississippi and Tennessee Railroad Company could have rebuilt their bridge, and the Mississippi Central Railroad Company could not have erected a new one, incalculable advantages would have accrued to the plaintiffs in error, by their being enabled to transport their passengers and freight trains directly to their depot in Grenada, connecting the Mississippi Central track south of the river, thereby controlling and forcing freights and passengers, both ways, over their road.

It will be observed from our inspection of the *diagram* in the record, that it was *impossible* to connect the track of the two roads, unless the Mississippi and Tennessee Railroad Company should build a new track, of about five-eighths of a mile in length, from their old track, on the north side of the river, to the tracks of the Mississippi Central railroad, a few hundred yards south of the partnership bridge. This road could not be made unless it passed through the land of the defendant in error. Application was made to Devaney, by the Mississippi and Tennessee Railroad Company, to purchase the right of way over said land for the contemplated track; the defendant in error refused to sell the right of way to the company. Under this state of the case it would seem the *only alternative left to the plaintiffs in error was to rescind their contract with the Mississippi Central railroad for the erection of the partnership bridge, and surrender their depot, in the town of Grenada, and establish a depot, on the north side of the Yallobusha river,*

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at the terminus of their old track, *unconnected with the Central railroad track*, to the great annoyance of the traveling public, to the great detriment of the pecuniary interests of the company, *if not to its destruction*, or to pursue the course they did in having the land of the defendant in error condemned by a jury of review for the use of the company, under the provisions of their charter.

Under the circumstances (shown by the proof) existing at this time, the partnership bridge over the Yallobusha river *could not have been constructed unless the contemplated branch road* was also laid by the Mississippi and Tennessee Railroad Company. The failure of one would necessarily cause the failure of the other. As a natural consequence of such failures, the plaintiffs in error would have been compelled to abandon their depot at the terminus of their road in Grenada. There was not only a private, but a *great and pressing public, necessity* operating upon the plaintiffs in error to take the only course left to the company by which two of the great railroad companies of the state would be enabled to repair their roads, and thereby restore them to active operations over their lines. The traveling public, the great agricultural and commercial interests of the country, were to be benefited by the speedy completion of the roads.

The provisions of the charter of plaintiffs in error, in section 7, investing the president and directors of the company "with all the rights, privileges, and powers requisite and necessary for the construction and repair and maintenance of the road," invested them with the implied power to take lands *in invitum*, after the location and completion of their railroad, *if there was a necessity for the exercise of this power*, for the preservation of some right they would lose without the exercise of it, or for the *repair or maintenance* of their road.

The facts of the case existing prior to the action of the jury of review of the 11th of November, 1865, we think, brings the action of the plaintiffs in error, in this particular, clearly within the *exceptions* to the rule deciding the cases cited, and relied upon by counsel for defendant in error. If we are right in this view of the law and the facts of the case under discussion, it follows that the condemnation of defendant in error Devaney's land, by the jury of review of the 11th of November, 1865, was legal, and the land thereby condemned vested in the plaintiffs in error on the 14th day of November, 1865, when the \$300 land damages, so assessed for the

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same, was tendered to the defendant in error by the plaintiffs in error.

In this conclusion we are fully sustained by the decisions from 1st and 9th La. An. Rep. and 2 Richardson's (S. C.) Rep. But we may have been mistaken in the disposition of the second question presented by the argument of counsel for the defendant in error. we shall therefore consider the facts of the case shown by the record to have existed *after* the action of the jury of review of the 11th of November, 1865, and tender of the damages assessed by them on the 14th of November, 1865, by plaintiffs in error to defendant in error, with a view to the disposition of the third and last position assumed by counsel for the defendant in error, "that the entry upon the land in controversy, by the Mississippi and Tennessee Railroad Company, constituted them naked trespassers, and for that reason the iron cross-ties and road-bed, laid upon the land in controversy, was the property of Devaney at the time of the trial of the cases, and that the verdict for their value in favor of defendant in error should not be disturbed."

For the purposes of this discussion, let it be considered that the plaintiffs in error had no legal right to enter upon the land in controversy, by virtue of the condemnation made by the jury of review and the tender of the \$300 land damages, previous to the passage of the amendment to their charter on the 21st of November, 1865, authorizing the company to connect their track with the Mississippi Central road on the north side of Yallobusha river. Were they naked trespassers by their entry upon the land after the passage of said act, or did they enter under color of title?

The charter of the plaintiffs in error contained provisions authorizing the company to exercise the rights of *eminent domain*, and to take such lands for the "construction, repair and maintenance" of their road as they might see proper to appropriate to their use for these purposes.

The plaintiffs in error, believing they had the authority, by the power conferred by sections Nos. seven and eight of their charter, to have the land of the defendant in error taken *in invitum* after the failure to purchase it from him, caused the impanneling of the jury of review and the condemnation of the land to their use.

Should the plaintiffs in error have desisted from entering on the land because the defendant in error considered the action of the jury of review of the 11th of November, 1865, void? There was no

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other land to be had over which the contemplated branch road could be constructed. There was no other course left the plaintiffs in error but to enter on the land condemned, or attempt to do so; by either course the plaintiffs in error would make a case for the adjudication of the power of relocation claimed by the plaintiffs in error and denied by defendant in error. The defendant in error could have enjoined the plaintiffs in error from constructing the road; this course would have settled the question of the legality of the action of the jury of review of the 11th of November, 1865. Counsel say Devaney was not required to do any thing; that plaintiffs in error knew the order of condemnation of the 11th of November, 1865, was void, and if the company entered, it was at their peril.

After the passage of the act amendatory of the charter of plaintiffs in error aforesaid, defendant in error did not notify plaintiffs not to enter upon the land, or enjoin the company from so doing. The only allegation he could have made in opposition to the entry on the land would have been, that the verdict of the jury of review was void, *because it was done before the passage of the act of the 21st of November, 1865, authorizing the company to connect with the Central road north of the Yallobusha river.*

The impanneling of a new jury would have been the consequence, if the injunction had been granted; and a condemnation of the land would have been made, to which there could be no objections raised, except as to the amount of damages, or to the constitution of the jury of review. But the defendant in error preferred to stand by and see the plaintiffs in error enter upon the land, to which they believed they had a valid title, having complied with every requisition of their charter for their observance in subjecting lands *in invitum* to their use.

The refusal of the defendant in error to receive from plaintiffs in error the \$300 land damages assessed by the jury of review of the 11th of November, 1865, was an obstacle to the entry of plaintiffs in error upon the land in question. The payment or tender of the money so assessed had first to be made to the defendant in error by the company before their right accrued to enter upon the lands. This condition precedent having been performed, there was nothing now required of the plaintiffs in error by their charter to enable them to enter upon the land condemned, as aforesaid, to their use. This Devaney knew. After the amendment to the charter of the plaintiffs in error, all doubts were at an end as to the power of the

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plaintiffs in error to exercise their right of *eminent domain* in procuring land for their branch road. Then why the necessity of having a new jury of review, if the one first impaneled was in all things summoned and organized according to the requisitions of the charter of the plaintiffs in error and the law, unless the defendant in error was dissatisfied with the amount of damages assessed by this jury? The proof shows that the jury was organized and acted in strict accordance with the law and the charter of plaintiffs in error. The law never requires the performance of a vain thing. If this is true as a principle, was there a necessity for the summoning and impanneling of a new jury of review to do what the first jury had already done? Certainly not, unless the defendant in error required one on the ground that the first did not assess sufficient damages; if he did not consider them large enough, he should have expressed this dissatisfaction to the amount so assessed, by appealing to the circuit court of Yallobusha county, or should have demanded the new jury of review. He did nothing to indicate to the plaintiffs in error the abandonment of his rights to demand the \$300 land damages. The course pursued by the defendant in error relative to the verdict of the jury of review of the 11th of November, 1865, before the entry upon the land in question by the plaintiffs in error, and his failure to avail himself of the remedies given to him by the law to prevent an entry upon the same, and his evasion of all objections to the substance of the verdict, preclude him from setting up the objection to this verdict, etc., now made here for the first time, and insisted upon so earnestly by his counsel; they are purely technical, and without legal force.

Viewing the verdict of the jury of review of the 11th of November, 1866, in the light taken of it, as to its legal effect, by the counsel for defendant in error, still we cannot regard the plaintiffs in error as *naked trespassers*. The entry upon the land was *bona fide*, under the belief that the title was vested in the company by said verdict, after the tender of the land damages on the 14th of November, 1865, and of the passage of the amendment of their charter of the 21st of November, 1861. All these facts considered, their entry upon the land was clearly under color of title; consequently, the plaintiffs in error are entitled to all legal protection to their improvements and property placed upon the track, given by statute to parties in possession under color of title.

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(from the verdict of which defendant in error appealed to the circuit court of Yallobusha county, and from the verdict in said court the plaintiffs in error have brought the case here, by writ of error), was unnecessary; there was nothing for them to operate upon. The verdict of the jury of review of the 11th of November, 1865, having condemned the land to the use of the plaintiffs in error, the title was divested out of the defendant in error by the tender of the \$300 land damages, on the 14th of November, 1865, and vested in the Mississippi and Tennessee Railroad Company. The proceedings under the jury of review of the 11th of November, 1865, constituted, we think, a valid defense to the action of ejectment No. 11,057.

We are therefore of the opinion that the court erred in giving the instructions asked by the plaintiff below, and erred in refusing the instructions asked by the plaintiff in error.

The judgments in both cases must be reversed, and a new trial granted in both cases.

THOMAS, plaintiff in error, v. TAYLOR.

(42 Miss. 651.)

Confederacy—Acts of rebel states not binding on subsequent government.

The plaintiff, in payment of a tax, levied by the state on his cotton, in 1866 tendered to the sheriff a "cotton note," issued under an act of the confederate legislature of 1861, and made receivable in payment of all present or future taxes. The sheriff refusing to receive the note, plaintiff brought suit for an injunction to restrain the sale and compel acceptance. *Held*, that the confederate state government being neither a *de jure* nor *de facto* government, its acts were not binding on a succeeding lawful government; and that the notes in question, being issued in aid of the rebellion, were void, and, therefore, not receivable.

THE defendant in error filed his bill of complaint in the chancery court of Hinds county, for the first district thereof, against the plaintiff in error, as sheriff and tax collector of said county, and B. H. Pitman, alleging that he was the owner and possessor of fifty bales of cotton made in said county; that he had baled and prepared for market and was about to ship the same; that there was then due and owing the sum of two dollars per bale, for tax on said fifty bales of cotton, by virtue of an act of the legislature of the state of Mississippi, entitled "An act levying a special tax upon

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certain persons and property therein named," approved November 16, 1865.

The bill further alleges that the defendant in error tendered to the said B. H. Pitman, the regularly appointed and qualified deputy of the said Samuel Thomas, sheriff and collector, as aforesaid, in payment of the tax due and owing by him on said fifty bales of cotton, a one hundred dollar treasury note of the state of Mississippi, commonly called a cotton note, duly issued by virtue of an act of the legislature of said state, on the day of the date thereof, entitled "An act to be entitled an act authorizing the issuance of treasury notes as advances upon cotton," approved December 19, A. D. 1861.

The bill further charges that the said treasury note, so tendered by defendant in error as aforesaid, was and is, by virtue of the said act of the legislature authorizing the issuance of the same, receivable for all taxes then due, or that may thereafter become due, to the state or any county or municipal corporation, except the military tax, and that said act is in full force and virtue, and, by force thereof, the said note so tendered was and is receivable for all state taxes then due or thereafter to become due, except the military tax.

The bill further states that the said Pitman, as deputy sheriff as aforesaid, refused to take the said treasury note in payment of the said taxes, as by law he was bound to do, to the manifest injury, wrong and injustice to the defendant in error.

The bill further charges that the said act of the legislature, approved November 16, A. D. 1865, requiring the plaintiff in error, as collector of taxes, to collect said tax in the currency of the United States, on which the plaintiff in error relies to justify his refusal to receive said treasury note in payment of said tax, is, so far as the said act forbids the receipt of the said treasury note in payment of the said tax, unconstitutional and void, as impairing the obligation of the contract of said state to receive said treasury notes, issued under said statute, approved the 19th December, A. D. 1861, in payment of all taxes then due, or that might thereafter become due, to said state, except said military tax.

And the bill further states that the said Pitman, deputy as aforesaid of plaintiff in error, sheriff and tax collector as aforesaid, having illegally and wrongfully refused to receive said treasury note, tendered as aforesaid, has levied on a part of said cotton to pay and satisfy said tax, and will proceed to sell the same, unless restrained by the proper process of the court. And prays for the ordinary

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process, and also for a writ of injunction, to restrain the plaintiff in error, and the said Pitman, and each of them, from selling said cotton for said tax, until the further order of the court, and that upon the final hearing the injunction may be made perpetual; and that the plaintiff in error be decreed to receive the said treasury note in full payment and satisfaction of the taxes due by the defendant in error on said fifty bales of cotton.

At the June term of said court, 1866, the defendants in the court below appeared and demurred to the bill of complaint, for the want of equity on the face of the bill, which demurrer was overruled by the court, and, the defendants declining to answer further to the bill, the same was taken for confessed; and, upon final hearing, the court perpetuated the injunction, and decreed that the plaintiff in error, as tax collector as aforesaid, receive the said treasury note in satisfaction of said tax, and receipt to the defendant in error in full for said tax.

From said decree the plaintiff in error brings the cause to this court by writ of error, and makes the following assignments of error:

1. The court below erred in overruling the demurrer of the defendants to the complainant's bill.
2. The court below erred in rendering final decree for the complainant.

Wiley P. Harris, C. C. Shaakelford and Jasper Myers, for plaintiff in error.

George L. Potter and Johnston & Johnston, for defendant in error.

PEYTON, J. Much learning, research, ingenuity and ability have been displayed by the counsel on each side, on the argument of this cause; and its importance, both with reference to the interesting legal questions and principles involved, and the vast pecuniary interest dependent upon the result, demand the most mature and deliberate consideration of this court. And, in order to a correct understanding of the principles involved in this case, we deem it not improper, on this occasion, to advert for a moment to the nature and character of our system of government. And, in discussing the purely legal questions involved, we adopt as our guide on this occasion the same rule which was laid down for the court in the case of *The Louisville and Nashville Railroad v. Davidson*, 1 Sneed, 637, where the court says: "If the construction and administration of our laws, supreme

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or subordinate, were to be governed by the opinions of judges as to the genius or general principles of republicanism, democracy or liberty, there would be no certainty in the law, no fixed rules of decision. These are proper guides for the legislature, where the constitution is silent, but not for the courts. It is not for the judiciary or executive department to inquire whether the legislature has violated the genius of the government, or the general principles of liberty and the rights of man, or whether their acts are wise and expedient or not, but only whether it has transcended the limits prescribed for it in the constitution. By these alone is the power of that body bounded. That is the touchstone by which all its acts are to be tried; there is no other. It would be a violation of first principles, as well as their oaths of office, for the courts to erect any other standard. There is no higher law than the constitution known to our system of government." So, on the present occasion, it is not for us to inquire whether the provisions of our federal constitution are wise or unwise, but what they are, and what is their true interpretation.

The constitution of the United States is not merely a league of sovereign states, for their common defense against external and internal violence, but a supreme federal government, acting not only upon the sovereign members of the union, but directly upon all its citizens in their individual and corporate capacities. It was established, as the constitution expressly declares, by "the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to them and their posterity." This constitution, and the laws made in pursuance thereof, and treaties made under the authority of the United States, are declared to be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. The avowed intention was to supersede the old confederation, and substitute in its place a new form of government. The sad experience of the inefficiency of the old confederation, which was a mere league of states, without any cohesive power or energy, forced the people of the states to surrender the league then existing, and to establish a national constitution of government, which has been the subject of different interpretations, according to political complexion of parties, with reference to the extent of the powers of the

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federal and state governments; yet it is a historical fact, that, although many declarations of rights, many propositions, and many protestations of reserved powers are to be found accompanying the ratifications of the constitution in the various state conventions, sufficiently evincive of the extreme caution and jealousy of those bodies, and of the people at large, there is nowhere to be found the slightest allusion to the instrument as a compact of states in their sovereign capacity, and no reservation of any right, on the part of any state, to dissolve its connection, or to abrogate its assent, or to suspend the operations of the constitution as to itself. On the contrary, the convention of Virginia, which speaks most distinctly on this subject, and, as we think, most correctly, merely declares "that the powers granted under the constitution, being *derived from the people of the United States*, may be resumed by *them* (not by any one of the states), whenever the same shall be perverted to their injury or oppression." Of the right of a majority of the whole people to change their constitution at will, there can be no doubt. And when there is an accumulation of usurpations and abuses, rendering passive obedience and non-resistance a greater evil than resistance and revolution, the form of government may then be changed by *successful* revolution, an appeal from the canceled obligations of the constitutional compact, to original rights and the law of self-preservation. This is the *ultima ratio* under all governments, whether consolidated, confederated, or, like ours, a compound of both; and it cannot be doubted that a single member of the Union, in the extremity supposed, but *in that* only, would have a right, as an extra and ultra constitutional right, to make the appeal.

The government of the Union, though limited in its powers, is supreme within its sphere of action. The international relations of these states with foreign states are exclusively maintained by it, while their municipal regulations and internal affairs are maintained and conducted by them. The external sovereignty, therefore, of the nation is exclusively vested in the Union, and the independence of the respective states, so far as the legitimate powers of the government of the United States extend, is merged in the sovereignty of the federal government.

The great question presented by this record is, whether the state of Mississippi, and the rightful authority which now controls her people, are bound by the acts and engagements of the government which was organized under the ordinance of secession in 1861. and

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finally overthrown by the military forces of the United States in 1865. In order to a proper solution of this question, the precise character of that government while it existed should be first ascertained.

At the time of the passage of the ordinance of secession, the state of Mississippi was one of the states of the Union, and her constitution and government constituted part of the machinery by which the government of the United States was carried on and maintained. The government then in existence assisted to form the senate and house of representatives of the United States, and in the election of the president of the United States. The laws of the United States were the supreme laws of the state of Mississippi; and though the government was separate from the governments of the other states, it was not separate from that of the United States: there was an intimate connection between them, and a mutual dependence upon each other.

The government founded on the ordinance of secession was a government without any connection with or dependence on the government of the United States. It denied the authority of the constitution and laws of the United States over the people of Mississippi, who were declared to be no longer a part of the people of the United States. This denial was accompanied by the adoption of a new constitution, in many respects like the old one, but fundamentally different in that feature of it which severed the connection of the government of Mississippi with that of the United States, and in the assertion of the absolute independence of the government of the former. The senators and representatives in the congress of the United States were withdrawn, and all the laws by which the people of Mississippi and the government thereof participated in the government of the United States were abolished.

The government thus set on foot proceeded, in conjunction with other state governments similarly erected and controlled, to form a confederation of states, by adopting a constitution and government for the people of the states so confederating, through the agency of these state governments. The obligations and connections thus formed and incurred were wholly incompatible with those which existed under the government of the United States, of which the new confederacy declared themselves entirely independent. It thus appears very evident that the government of the

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state of Mississippi as one of the United States, and the government of the state of Mississippi as one of the confederate states, were not identical, and could not in the nature of things be the same. And although the members of the legislature of 1861 may, as counsel for defendant in error has alleged, have been elected under the former, yet it is very clear that they formed the legislature of the latter. The constitution of the state of Mississippi as one of the confederate states, and the constitution of the confederate states, both require that the members of the legislature shall, before they enter upon their duties, take an oath or affirmation to support the constitution of the confederate states. The members of the legislature of that year, if they took any oath at all, must have taken an oath or affirmation to support the constitution of the confederate states of America, according to the requirements of said constitution. The legislature of Mississippi, from the date of the ordinance of secession to the surrender of the confederate armies, was done either without the sanction of an oath, or under an oath to support a constitution adopted in violation of the constitution of the Union, and for the express purpose of subverting the government of the United States; either of which, we think, would be sufficient to invalidate the legislation. We are aware that our predecessors have arrived at a different conclusion in the case of *Hill v. Boyland*, 40 Miss. 640. The court in that case says: "That the provision in the constitution of the United States, as well as that of the state of Mississippi, requiring members of the legislature to take an oath to support the constitution of the United States, is merely directory; and the failure to take such oath will not invalidate their action." The constitution of the United States provides that the senators and representatives in congress, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, *shall* be bound by oath or affirmation to support that constitution. We cannot think that so important a provision in the paramount law of the land was intended to be merely directory, and not absolutely necessary to be complied with. Story, in the third volume of his commentaries on the constitution of the United States, 702, says: "That all those who are intrusted with the execution of the powers of the national government should be bound by some solemn obligation to the due execution of the trusts reposed in them, and to support the constitution would seem to be a proposition too

clear to render any reasoning necessary in support of it. It results from the plain right of society to require some guaranty from every officer, that he will be conscientious in the discharge of his duty. Oaths have a solemn obligation upon the minds of all reflecting men, and especially upon those who feel a deep sense of accountability to a supreme being. If, in the ordinary administration of justice in cases of private rights or personal claims, oaths are required of those who try, as well as of those who give testimony, to guard against malice, falsehood, and evasion surely like guards ought to be interposed in the administration of high public trusts, and especially in such as may concern the welfare and safety of the whole community.

“But it may not appear to all persons quite so clear, why the officers of the state governments should be equally bound to take a like oath or affirmation, and it has been even suggested that there is no more reason to require that, than to require that all of the United States’ officers should take an oath or affirmation to support the state constitutions. A moment’s reflection will show sufficient reasons for the requisition in the one case, and the omission of it in the other. The members and officers of the national government have no agency in carrying into effect the state constitutions. The members and officers of the state governments have an essential agency in giving effect to the national constitution. The election of the president and the senate will depend in all cases upon the legislatures of the several states; and in many cases the election of the house of representatives may be affected by their agency.” This reasoning we deem satisfactory. *Cooley’s Const. Lim.* 74, 78, 82, 140, 150; *Duer’s Const. Jur.* 403.

What the government of the state of Mississippi, a member of the confederate states, did, from the passage of the ordinance of secession in 1861 to the surrender of the confederate armies in 1865, cannot, with any propriety, be said to have been done by the government of the state of Mississippi, one of the United States. When that ordinance passed, there ceased to be within the state a government under the constitution of the United States. The governments of the several states of the Union are recognized by the government of the United States, and the government of the United States may refuse to recognize a particular state government, or may withdraw a recognition already given. Thus, in the time of the Dorr rebellion in Rhode Island there were two govern-

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ments, each of which claimed to be the lawful government of the state, and the United States recognized one of them, and refused to recognize the other. And, when South Carolina and several other states seceded, as it was called, the United States, though requested, refused to recognize the new out-union governments, as being no governments at all in those states. Yet, as those new governments superseded the old ones, there ceased to be any governments in those states recognized by the United States. It is nevertheless true, that, in point of fact, there were governments in those states.

Mr. Madison, in his report on the Virginia resolutions, says: "That the term 'states' is sometimes used in a vague sense, and sometimes in different senses, according to the subject to which it is applied. Thus, it sometimes means the separate sections of territory occupied by the political societies within each; sometimes the political governments established by those societies; and, lastly, it means the people composing those political societies in their highest sovereign capacity."

The government of the United States has uniformly, from early in 1861 to the spring of 1865, characterized the controlling authorities of those seceded states, not as governments, but as unlawful combinations of rebellious persons, usurping the functions of government, and forcibly controlling the people. That government has invariably regarded them as parts of a machinery for waging unlawful war, and making treasonable resistance to the rightful authority of the United States, having their central power in the government of the confederate states, and coöperating in one combination for the unlawful and treasonable purpose of overthrowing by force of arms the constitution of the United States.

It is insisted by counsel for the defendant in error, that the government of the state of Mississippi, during the late disastrous war, was, at least, a government *de facto*, whose obligations devolved upon the succeeding government. The terms *de facto*, as descriptive of a government, have no well-fixed and definite sense. It is, perhaps, most correctly used as signifying a government completely, though only temporarily, established in the place of the lawful or regular government, occupying its capital and exercising its power, and which is ultimately overthrown and the authority of the government *de jure* reëstablished. Guided by this rule, neither the government of the confederate states, nor the several governments of

any of the states composing the confederacy, can properly be said to be a *de facto* government from the date of secession to the overthrow of the confederate government. As to the confederate government, it never held the national capital. It never asserted any authority to represent the nation. It was only what it professed to be — a revolutionary organization, seeking to establish a confederacy of states, and dependent wholly for success upon the success of the revolution. But it has never been held that those participating in a rebellion, which had only extended its authority over part of a country, had established a *de facto* government. As to the government of this state, it was not overthrown by the former lawful government of the state, but by the arms of the United States; and when thus overthrown, it was not succeeded by the reestablishment of the authority of the former government *de jure*. for the reason that that government was wholly destroyed by the establishment of the new government under the ordinance of secession.

But the terms *de facto*, when employed as descriptive of government, are often used, and perhaps more frequently in a sense less precise than that above indicated, as signifying any organized government, established for the time over a considerable territory, in exclusion of the regular government. A *de facto* government of this sort is not distinguishable in principle from other unlawful combinations. It is distinguishable in fact mainly by power, and in territorial control, and by the policy usually adopted in relation to it by the national government. With respect to such a government, it is clear that none of its acts in hostility to the regular government can be recognized as lawful, yet it is equally clear that transactions between individuals, which would be legal and binding under ordinary circumstances, cannot be pronounced illegal and of no obligation, because done in conformity with laws enacted or directions given by the usurping power. Between the extremes of lawful and unlawful there is a large variety of transactions, to which it is difficult to apply strictly any general rule.

It cannot be denied that the government of the confederate states was in possession of many of the highest attributes of sovereignty — sufficiently so to be regarded for the time as the ruling or supreme power of the district of country over which its jurisdiction extended, and of sufficient resources in men and money to carry on a civil war of unexampled dimensions; and during all which time, in the interests of humanity, to mitigate the vindictive passions growing out

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of a civil conflict, and to enable the United States to invest the people of the confederate states with the character of public enemies, and their property as enemies' property, in order that the advantages of capture and seizure might be rightfully secured according to the laws of war, many belligerent rights were conceded to it by the supreme government. Nevertheless, the supreme court of the United States, in the case of *Mauran v. Insurance Company*, 4 Wall. 13, have decided that all the proceedings of the states in rebellion, either severally or in conjunction, by means of which the lawful governments in those states were overthrown, and new governments erected in their stead, were wholly illegal and void.

In the case of *Hill v. Boyland*, 40 Miss. 637, the court say: "Admitting, then, that the act of secession was a nullity, the state of Mississippi, neither in fact nor in legal contemplation, could be annihilated by a void ordinance. The attempt to change her relations toward the United States government only involved her external relations. Within her limits there remained a regularly organized government *de jure*, as well as *de facto*, which was never disputed." We freely admit that neither the people nor the territory of the state of Mississippi was annihilated by the void ordinance of secession, but we deny that the political organization established by the people of Mississippi, immediately following the passage of that ordinance, was a government *de jure* of the state; and we have before shown that it was not even a government *de facto*, according to the meaning of those terms as used in international law, when applied to the facts as they existed at the time that organization was in operation in this state. The old government of the state was undoubtedly abolished by the new one, which had a constitution, as we have elsewhere shown, different in many important features from the old one. We think it would be transcending the bounds of judicial propriety to enter fully here into a discussion of the theory of state rights, which we think is better suited to a political arena than a judicial forum. We will, therefore, content ourselves with the expression of a respectful dissent from the doctrines laid down by our learned predecessors in the case above referred to.

It is insisted that the laws of the state enacted during the war continue in force until altered or abrogated by the succeeding government.

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The doctrine, that, by the law of nations, the municipal laws of a *ceded* or *conquered* country, existing at the time of cession or *conquest*, continue in force until altered or abrogated by the new sovereign, is not applicable to a case of rebellion. The territory of the state of Mississippi was a district of country constituting a part of the territory of the United States. No nation can make a conquest of its own territory. It acquires no new title, but only regains the possession of which it was temporarily deprived. Upon the reduction of the rebellion, the territory of Mississippi was neither *ceded* to, nor *conquered* by, the United States, and, therefore, the principle invoked will not avail the defendant in error.

The state of Mississippi was absolved from the obligation of her contract to receive the treasury notes, commonly called the cotton notes, issued under the authority of the statute of the 19th December, A. D. 1861, in payment of the taxes and dues to her, by the destruction of the government which enacted it by the arms of the United States, in 1865.

A state is defined by Vattel, 59, to be a body politic, or a society of men, united together to promote their safety and advantage, by means of their union; who are guided and directed by the public political authority—the government. Government is the ligament that holds the political society together, and, when that is destroyed, the society as a political body is dissolved.

Rutherford, in his Institutes, lays down the doctrine, that “the rights which belong to a civil society fail or are lost when the society ceases to exist; and upon the same event the members of it lose their rights. But this is to be understood of those rights only which belonged to them as members of the society, and not of those which belonged to them as individuals. The right which each of them had to his life, to his liberty, to his lands, or to his movable goods, and other rights of the same sort, are not directly affected by the destruction of the society of which they were members, however they may happen to be remotely affected. The same effect that is produced by the destruction of a society in the rights of the whole collective body and of its several members, will be produced, likewise, in their respective *obligations*. Thus, the debts of a society are canceled when the society perishes; though the members, while the society subsisted, were jointly bound to contribute toward the payment of the public debts, this *obligation* will cease when the society subsists no longer. But the destruction of the

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society does not cancel any debts which the members of it had contracted as individuals, upon their own private account."

The laws of the insurrectionary government ceased when that government was overthrown. They had no legal authority, and had only the authority which force gave them, and, when that yielded, the laws enacted by the unlawful government ceased to have any operative force as to the future. They could not, in the nature of things, continue to operate without the consent of the incoming legitimate authority. It rests with the succeeding legitimate government to revive and continue them in force.

The laws of the insurrectionary government of the state could not be enforced by the courts of the country unless they were adopted by the legitimate government, for the reason that the government that enacted them never was recognized by the government of the United States or any department thereof. Halleck on International Law and Laws of War, 75, § 22, says: "The recognition of the independence and sovereignty of a revolted province by other foreign states, when that independence is established in fact, is a question of policy and prudence only, which each state must determine for itself; but this determination must be made by the sovereign legislative or executive power of the state, and not by any subordinate authority, or by the private judgment of individual subjects. And until the new state is recognized by the government of the country of which it was before a part, or by the foreign state where its sovereignty is drawn in question, courts of justice and private individuals are bound to consider the ancient state of things as remaining unaltered." Wheaton enunciates the same doctrine in his Treatise on International Law, part 1, chapter 2, § 10. And in the case of *Luther v. Borden*, 7 How. (U. S.) 1, the court says: "Where there is a controversy between two governments as to which is the true government, the question must be settled by the political department, and not by the judiciary. The constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a state, has treated the subject as political in its nature, and placed the power in the hands of that department; that, under the fourth section of the fourth article of the constitution, it rests with congress to decide what government is the established one in a state. For, as the United States guarantee to each state a republican government, congress must necessarily

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decide what government is established in the state before it can determine whether it is republican or not; and when the senators and representatives of a state are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority; and its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. The right to decide such questions is placed in congress, and not in the courts."

No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, sovereignty in every state resides in the people of the state, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing the old government and establishing a new one in its place is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it. Any other rule of practice would break up the harmony of the government, and expose its political and judicial departments to continued conflicts. The one might recognize the new government and the other refuse to do so, and thus involve the nation in conflicts of power between the different departments of the government. The new state government that enacted its laws has ceased to exist; it has no power any longer to enforce them; and surely it cannot with any legal propriety be contended that the courts of the United States, either state or federal, are bound to execute the law of an extinct insurgent power, enacted against the policy and authority of the government of the United States, and with a view to its overthrow.

The rebellion, in its revolutionary progress, having *deprived the people of the state of Mississippi of all civil government*, the president of the United States, in order to avert the manifold evils consequent upon a state of anarchy, assumed to initiate the means for re-organizing a civil government for the people of the state, and with that view, on the 13th of June, A. D. 1865, appointed a provisional governor of the state, who, after appointing certain civil officers, and reviving and declaring certain laws to be in force, called a convention of the people of the state. That convention, in the month of August of that year, framed a constitution and organized the government now existing in the state, and passed an

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ordinance by which all the laws enacted by the legislature of the state, since the 9th of January, 1861, so far as the same were not in conflict with the constitution and laws of the United States or of the constitution of this state as it existed on the 1st day of January, 1861, or *in aid of the rebellion*, except the laws in relation to crimes and misdemeanors, and except also an act to enable the railroad companies of this state to pay the moneys borrowed by them, approved December 7th, 1863, were revived, ratified, and declared to be valid and binding from their respective dates, and to remain in force until altered or repealed by the proper authority. And by the provisions of that ordinance all the official acts of the public officers of the state; all the official acts, proceedings, judgments, decrees, and orders of the courts of the state; and all marriages of persons capable of contracting that relation, are legalized, ratified, and confirmed.

Whether the president, in thus proceeding, transcended his legitimate powers, it is unnecessary to inquire, inasmuch as the congress of the United States have recognized the existing government of the state as a provisional one. It is competent for the political department of the supreme government to waive any irregularity in the formation of a state government, and recognize it, as was done in the case of California; and such act of recognition, though the proceeding might have been irregular, will bind the country and the courts.

The act in question of the 19th of December, 1861, authorized the issuance of treasury notes to the amount of five millions of dollars. This act, by virtue of which the treasury note was issued that was tendered to the plaintiff in error by the defendant in error in payment of the tax due the state on his cotton, we believe, in its operation and effects, to have been *in aid of the late rebellion*, and therefore was not revived and continued in force by the ordinance of the convention of 1865. We regard it as a part of the financial system of the state at a time of great pecuniary want, to supply not only a circulating medium for the people in the transactions of their ordinary business, but also to furnish the means by which an empty treasury of the state might be replenished.

The tenth section of the act provides "that the said treasury notes shall be receivable in payment of all taxes now due or that may hereafter become due to this state, or to any county or school fund, or municipal corporation, except the military tax;" and that

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"the said notes, when so received for taxes, may again be paid out by the treasurer upon any warrant of the auditor, drawn upon the general treasury." Hence, it will be seen that these notes were intended to supply an important part of the revenue by which the state government was to be sustained and enabled more effectually to aid the confederate government in the prosecution of a sanguinary war, waged expressly for the purpose of subverting the government of the United States. These treasury notes, being thus issued against the public policy, and in violation of the constitution of the United States, are, therefore, illegal and void.

This view of the case makes it unnecessary to consider whether these treasury notes are in violation of that provision of the federal constitution which prohibits the states from emitting bills of credit.

For the reasons stated in this opinion, the decree must be reversed, the demurrer sustained, the injunction dissolved, and the bill dismissed.

HOLT, plaintiff in error, v. BARTON.

(42 Miss. 711.)

Contracts — separation of legal from illegal.

A gave certain military companies ten bales of cotton to aid in equipping them for the confederate service, which the agent of the companies sold to B. while yet undelivered. B. gave a receipt for the purchase-money, in which he agreed to hold the cotton subject to the order of A. Upon failure to deliver a portion of the cotton action was brought for the value. *Held*, that although the transaction was illegal as between B. and the military companies, the contract sued on was subsequent and distinct, unaffected by the original transaction, and, therefore, valid.

THE facts are set forth in the opinion.

Jarnagin & Rives, for plaintiff in error.

Israel Welch and E. Dismukes, for defendant.

PEYTON, J. This is an action of assumpsit, brought by the plaintiff, to recover damages for breach of defendant's contract to

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deliver five bales of cotton at Macon station, on the Mobile and Ohio Railroad, in good order and condition for shipment, when demanded by the plaintiff.

To this action the defendant pleaded non-assumpsit, and it was agreed between the parties that all lawful matters of defense may be given in evidence under this plea, as if the same had been specially pleaded.

The facts of this case are substantially as follows:

That the defendant, in the year 1862, gave ten bales of cotton to two military companies then being raised in Noxubee county for the confederate service. The plaintiff bought the cotton from Edwards and McLelland, who were the agents of said companies, and took the receipt of the defendant for the sum of \$288, the amount for which the cotton was sold. In said receipt the defendant promised to deliver the cotton, at said Macon station, to the plaintiff when required to do so. Five bales of said cotton the defendant failed to deliver, and for this breach of contract the action was brought.

It is insisted, by the counsel for the defendant, that there was no consideration for the defendant's promise to deliver the cotton to the plaintiff. This position cannot be maintained. He donated the cotton to these companies, whose agents sold it to the plaintiff to raise money to clothe and equip them, and the money paid for the cotton, as acknowledged by the defendant in his receipt, was a sufficient consideration for his promise to deliver the cotton according to his undertaking.

It is next insisted that the transaction between the military companies and the defendant was illegal, and that the plaintiff participated in that illegal transaction; and, therefore, the promise of the defendant cannot be made the foundation of an action on the part of the plaintiff for the recovery of damages for breach of it.

It will be readily admitted that the agents of these military companies could not recover damages from the defendant for breach of contract to deliver the cotton for the purpose of clothing and equipping said military companies, for the reason that the agreement was illegal. *Ex turpi contractu non oritur actio*, is a revered maxim of the law, to which courts closely adhere.

This case, however, does not fall within this principle, because the plaintiff was not a party to the illegal contract between said military companies and the defendant. After the cotton was donated to these companies the plaintiff bought it from their agent.

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This was a subsequent and distinct contract, unaffected by the original transaction between the defendant and said companies. It was wholly disconnected from the illegal act, and founded on a new and independent consideration, and may be enforced, though the illegal original transaction was known to the plaintiff at the time that he bought the cotton. Thus it has been held, that if one should become answerable for expenses on account of a prosecution for the illegal importation of goods, or should advance money to defray the expenses, these acts would constitute a new contract, founded upon a new consideration, unless such agreement were made prior to the illegal importation, and forming a part of the consideration thereof. This proceeds upon the ground that the new contract is not founded upon an illegality.

The principle of law governing such cases is, that where the new contract was disconnected with the original unlawful act, and was founded on a new and distinct consideration, an action might be maintained upon it, although it could not be maintained upon a contract directly arising out of the illegal act. To hold otherwise, would put a most inconvenient restraint upon trade, and the whole business of life. 1 Chit. on Cont. 564; *Armstrong v. Toler*, 21 Wheat. 258.

This doctrine is fully recognized by this court in the case of *Green v. Sizer*, where the court says, that in order to render such a contract illegal, it must grow immediately out of, and be immediately connected with, the original illegal or immoral act, and not founded on a new consideration; and that a subsequent sale of the subject of the illegal act after the original act is consummated, and a contract founded thereon, will be valid. 40 Miss. 559.

The case at bar comes fully within these principles. The contract sued on was founded on a new consideration, not connected with the original illegal act, and between new parties. The plaintiff merely contracted for the subject of the illegal act, for a valuable consideration, and in the course of his lawful business, without any connection on his part with the original illegal transaction.

We think the verdict is contrary to law, and that the court below erred in overruling the motion for a new trial.

The judgment will be reversed, the verdict set aside, and cause remanded for a new trial.

Dever v. Steamboat Hope.

DEVER, plaintiff in error, v. STEAMBOAT HOPE.

(42 Miss. 715.)

Admiralty — Jurisdiction of state courts.

An attachment was issued against a vessel navigating the Yazoo and Mississippi rivers, to recover for repairs. These rivers were navigable by vessels of ten tons burden and upward from the sea; the vessel was a steamboat owned and having her "home port" in Mississippi. *Held*, that the vessel was within the maritime jurisdiction of the United States; that the state courts had no jurisdiction of the subject-matter, and could not be invested with such jurisdiction by the legislature of the state.

THIS was an attachment issued by the plaintiff in error against the defendant, under the provisions of the act entitled "An act to provide a remedy by attachment against ships, steamboats and other water craft." Chap. 53 of Rev. Code, 383.

Plaintiff in error made the affidavit required by article 2 of said act, in which he stated that "the 'Steamboat Hope,' a steamer in the navigable waters of this state," was indebted to him in the sum of \$339.15.

Plaintiff in error executed the requisite bond under the provisions of article 2, and the attachment was sued out, and made returnable to the circuit court of Yazoo county; the sheriff attached certain furniture and other chattels in and belonging to the boat, which were replevied by Thomas Metzler, the captain of the said "Steamer Hope," as required by article 3 of said act.

At the return term thereof the plaintiff in error filed his declaration on the account stated to be due him by the boat; stating that he is a citizen of the state of Mississippi, and that "the home port of the said defendant (the 'Steamer Hope') is in this state," and that the owners of said boat reside in Mississippi; it is further alleged that the cause of action is for work and labor performed by plaintiff in error upon said boat, in repairing the same, etc.

To this declaration the defendant filed a plea to the jurisdiction of the court, alleging that the defendant is a vessel navigating the Yazoo and Mississippi rivers, which are navigable from the sea by vessels of ten tons burden; and that the demand of the plaintiff if any, is cognizable in the district court of the United States, which has exclusive jurisdiction of all civil causes of admiralty

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and maritime jurisdiction where seizures are made in waters which are navigable from the sea by vessels of ten tons burden.

To this plea there was a demurrer, which was overruled; and the plaintiff declining to reply, judgment final was rendered for the defendant, and this writ of error is taken to that judgment.

The errors assigned are, that "the court erred in overruling the demurrer, and in rendering judgment for the defendant."

Wiley P. Harris, for plaintiff in error.

Miles & Epperson, for defendant in error.

SHACKELFORD, C. J. The only question for our consideration in this case is, whether the circuit court of Yazoo county had jurisdiction of the subject-matter of the action.

The objection to the jurisdiction is, that the case, as developed by the pleadings, was one exclusively of admiralty jurisdiction for the district court of the United States for the district of Mississippi.

Counsel for the defendant in error, in support of the proposition, refer us to the decisions of the supreme court of the United States, in the cases of *The Moses Taylor*, 4 Wall. 411, and *The Hine v. Trevor*, id. 555.

On the other hand, counsel for plaintiff in error cites the cases of *Allen v. Newberry*, 21 How. (S. C.) 244, and *McGuire v. Card*, id. 248, conclusive in favor of the jurisdiction of the circuit court below; and insists that unless the plea of the defendant in error contained an allegation that the "Steamer Hope" was engaged in the *United States trade*, that the demurrer should have been sustained to the plea of defendant in error to the jurisdiction.

The affidavit of plaintiff in error, asking for the attachment issued in the case under consideration, only contained an allegation that the "Steamer Hope" was indebted to him in the sum of \$339.15, and that the vessel "was in the navigable waters of the state of Mississippi." The authority for the proceedings in this case is article 1 of the "water craft" law above referred to, which provides that "where any person shall have any cause of action against the owner, captain, master, supercargo, or other person in charge of any ship, brig, schooner, sloop, steamboat, etc., in any of the navigable

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waters of this state, or navigating the rivers or seas in or adjacent to this state, for or on account of any such water craft, or the business in which said craft may be employed, it shall be lawful to prosecute the same against such water craft by the name thereof, or by such description as will enable the officer executing the writ to identify the same."

This statute gives the remedy to a creditor, whether the boat is engaged in trade exclusively between ports in the same state or ports in different states.

The plaintiff in error, in his declaration, alleges that the home port of the "Steamer Hope" is in the state of Mississippi. This allegation is equivalent to an allegation that the owners reside in this state, and nothing more, although counsel seems to consider it as sufficient to give the court jurisdiction, as the allegation was intended to show that the steamer was engaged exclusively in domestic trade, or trade and navigation, between ports in the state, and on waters entirely within the state.

This is an inference which, we think, cannot be legitimately drawn from the facts set forth in the affidavit and declaration of plaintiff in error.

If the jurisdiction of the court depended upon the fact that the steamer was engaged exclusively in trade within and upon the waters of the state, this the affidavit of plaintiff in error should have shown. Because the Yazoo river is a navigable stream entirely within the state, it does not follow that she was engaged in trade and navigation upon said river, or that the termini of her trips were ports in this state.

It is evident from the affidavit of plaintiff in error, that he relied upon the provisions of article 1 of the statute above referred to, for the legality of his proceedings, without reference to the trade she was engaged in.

Unless the jurisdiction of the court can be sustained under the affidavit of plaintiff in error, and the provisions of article 1 of the act in question, the allegation in the declaration, that the "home port" of the defendant in error is in this State, cannot strengthen his case, or give the court jurisdiction, if it had none at the commencement of his suit.

We are therefore to consider the question of jurisdiction solely upon the allegation in the affidavit of plaintiff in error, in connection with the provisions of art. 1 of the statute above quoted.

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In the case of *Allen v. Newberry*, the supreme court of the United States held, that a contract of affreightment between ports and places within the same state was not the subject of admiralty jurisdiction, as it concerned purely the internal state trade, and that the jurisdiction belonged to the courts of the state. This doctrine was affirmed at the same term of the court, in the case of *McGuire v. Cord*.

The doctrine announced in these cases cannot be applied to the case under consideration, if it were true that the defendant in error was engaged exclusively in the domestic trade, or between ports in this state. The doctrine in these cases has been overruled in the case of *The Belfast*, 7 Wall. 624.

In the opinion delivered by Justice CLIFFORD in that case, the case of *Allen v. Newberry* is reviewed. He says: "Remarks, it is conceded, are found in the opinion of the court in the case of *Allen v. Newberry* inconsistent with these views; but they were not necessary to that decision, as the contract in that case was for the transportation of goods on one of the western lakes, where the jurisdiction in admiralty is restricted by an act of congress, to steamboats and other vessels * * employed in the business of commerce and navigation between ports and places in different states and territories;" referring to *The Hine v. Trever*, 4 Wall. 555.

In the case of *The Belfast*, the owners of *The Belfast* excepted to the jurisdiction of the circuit court of the state of Alabama, and alleged that the steamer, at the time the cotton was shipped, was duly enrolled and licensed under the laws of the United States; that she was then and there engaged in commerce and navigation between the city of Columbus, in the state of Mississippi, and the city of Mobile, in the state of Alabama; and that the cotton described in the libel was lost on her trip from the former city to the port of destination.

The cotton was shipped from a port in the state of Alabama to the city of Mobile, in one of the shipments mentioned in the libel; but all the cases were to be decided together. The counsel for the libellants contended, that, inasmuch as the cotton was shipped, in one of the cases, from ports in the same state, the state court had jurisdiction of that case, impliedly admitting the jurisdiction of the court would not attach if the cotton had been shipped from a port in a different state to the city of Mobile.

The court, after an elaborate review of most of the decisions of

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the supreme court of the United States, involving questions of jurisdiction in cases of admiralty, held, that the state court in Alabama had no jurisdiction of the cases, including the one where the cotton was shipped in Alabama; and that the exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction is, by the terms of the ninth section of the judiciary act of 1789, conferred upon the district courts of the United States, "saving to the suitors, in all cases, the rights of a common-law remedy, when the common law is competent to give it, which the suitor can pursue in the state or circuit court of the United States. Common-law remedies are not applicable to enforce a maritime lien by a proceeding *in rem*, and consequently the original jurisdiction to infer such a lien by that mode of proceeding is exclusive in the district courts;" citing *The Moses Taylor*, 4 Wall. 411.

Nothing is said about concurrent jurisdiction in a state court or any other court.

Counsel for plaintiff in error insists that the plea of defendant in error "does not contain the necessary allegations to oust the circuit court of Yazoo county of jurisdiction." It was incumbent upon plaintiff in error to show, by the proceedings in his cause, that the court had jurisdiction of the subject-matter of the action, and if it was one of admiralty or maritime jurisdiction for the district court of the United States, it was not necessary to oust the court of jurisdiction for the defendant in error to plead to the jurisdiction, or to file any other plea, showing reasons why the case should be dismissed. The case could have been dismissed on motion of counsel, or even upon the court's own motion. 8 Mass. 87; 12 id. 367, and cases cited.

Admitting that we have misapprehended the rule of pleading in such cases, and that the doctrine contended for by counsel is correct, we are of the opinion that the plea to the jurisdiction was sufficient.

Under the rulings of the supreme court of the United States, in the cases of *The Moses Taylor*, *The Hine* and *The Belfast*, upon the question of jurisdiction, it was only necessary to show that the attachment or seizure was made in the navigable waters of the United States, navigable from the sea by vessels of ten tons burden, or upward. Navigable rivers which empty into the sea, or into the gulfs and bays which form part of the sea, are but arms of the sea, and

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are as much within admiralty and maritime jurisdiction of the United States as the sea itself.

Another view taken of this point by counsel for plaintiff in error is, that "material men" (furnishers of supplies, repairs, etc.) have no maritime lien on a vessel so supplied in her home port; and further, that a vessel engaged exclusively in the *domestic commerce of a state*, although plying in public navigable waters, is not within the admiralty jurisdiction of the United States; and contracts made with her, or her owners or officers, are not maritime contracts.

The first branch of this proposition is correct; but material men who furnish supplies or materials for a vessel in a foreign port, or in a port other than a port of the state where the vessel belongs, have a maritime lien on the vessel, as a security for the payment of the price of all such materials and supplies.

They have such a lien, because, upon the principles of the maritime law, such materials and supplies are presumed to be furnished on the credit of the vessel, and, consequently, they are entitled to proceed *in rem* in the admiralty courts to enforce the lien. *The General Smith*, 4 Wheat. 438; *The Belfast*, 7 Wall. 624.

The second branch of the proposition of counsel (quoted) we have shown to be untenable.

The record does not disclose any fact showing that the cause of action, the subject-matter of the attachment, was or was not created or contracted with the owners of the defendant in error at the alleged "home port" of the vessel.

There is nothing to show where the indebtedness was incurred.

The "home port" of the defendant in error, at the time of the creation of the indebtedness sued on, might have been in any other state, nothing in the record appearing to the contrary.

The allegation of the plaintiff in error in his declaration relative to the "home port" of the defendant in error, only applied to the *status* of the party defendant at the time of filing the declaration.

The record does not disclose any fact tending to establish the presumption raised by counsel, that the contract for labor and materials furnished was performed or executed at the "home port" of the defendant in error when she was attached.

Shipwrights who have taken a vessel into their possession to repair (if a domestic one), or have worked upon it without retaining it in their possession as a security for their claims, and have let

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it pass out of their possession, have no claim or lien upon the ship itself, unless given by statute law. 4 Wheat. 438.

There being no statute in this state creating a *specific lien* upon vessels for labor performed or materials furnished by shipwrights or material men, at the "home port" of vessels, and if they permit them to pass out of their possession without getting their pay they have to resort to their common-law remedy.

The plaintiff in error should have pursued his common-law remedy, in the circuit court of the United States, or in the state court, against the *owners* of the steamer, if he had performed the labor and furnished the materials for the boat at her "home port" in this state, the owners of the defendant in error being residents of the state at the time plaintiff in error sued out his attachment.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such lien, by suit or proceeding *in rem*, as practiced in the admiralty courts of the United States. *The Moses Taylor*, 4 Wall. 411; *Hine v. Trever*, id. 555; *The Belfast*, 7 id. 624.

The subject-matter of the controversy in the cause under consideration being within the admiralty and maritime jurisdiction of the district court of the United States, it necessarily follows that the court below had no jurisdiction of the case as prosecuted by plaintiff in error, the proceedings being purely *in rem*, and in the nature and with all the incidents of a suit in admiralty.

Therefore we are forced to the conclusion, that the court below did not err in overruling plaintiff in error's demurrer to the plea of defendant in error to the jurisdiction, and in dismissing the case.

Let the judgment be affirmed.

McGUIRE, plaintiff in error, v. STEVENS *et al.*

(12 Miss. 724.)

Statute of frauds.—Contract for sale of land.

A. contracted with B. for the sale of a lot of land, the only written evidence of the contract being several receipts, signed by A. and his agent acknowledging the receipt of certain sums of money from B. "in part payment for a house and lot," without describing the premises or furnishing

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any data for ascertaining their locality. *Held*, that said writings were insufficient to take the case out of the statute of frauds, and that part performance of the agreement was also insufficient in this state.

BILL to enforce specific performance, etc.

The facts are sufficiently set forth in the opinion. The receipts referred to are as follows:

Received of Mr. Patrick McGuire two thousand dollars, it being in part payment for a house and lot sold him by my brother, C. M. Stevens. Jackson, Miss., Oct. 8, 1863. J. O. STEVENS.

Received, Nov. 22, 1863, of Patrick Mc Guire, seven hundred dollars, as part payment on house and lot. CHAS. M. STEVENS.

Received of Pat. McGuire, July 22, 1864, three hundred and sixty dollars. CHARLES M. STEVENS.

Balance due C. M. Stevens, \$440.

Received, Aug. 14, 1864, of P. McGuire, one hundred and eight dollars. CHAS. M. STEVENS.

Received, Oct. 22, 1864 of P. McGuire, one hundred dollars, for Chas. M. Stevens. E. BENNETT.

W. & J. R. Yerger, for appellant.

Johnson & Johnson, for appellees.

PEYTON, J. It appears from the record in this case, that one Charles M. Stevens, in the year 1863, contracted with the appellant to sell him a lot of land, the title to which was in the appellee, James O. Stevens. Certain receipts of the said James O. Stevens and Charles M. Stevens, acknowledging the receipt of certain sums of money from the appellant, in part payment for a house and lot, without designating the same, or referring to any thing by which they could be ascertained, are the only evidence in writing of the said contract.

The appellant filed his bill in chancery for a conveyance of said lot to him, and for an injunction to restrain the prosecution of an action of ejectment against him by the appellee, Jane E. Stevens, to whom said property had subsequently been conveyed by the said James O. Stevens. To this bill the appellees filed their demurrer, which was sustained by the court, and the bill dismissed. And from his decree the case comes here by appeal.

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The main question for our determination is, whether this contract is such as can be specifically enforced under our statute to prevent frauds and perjuries, which provides that no action shall be brought upon any contract for the sale of lands, tenements or hereditaments, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him or her thereunto lawfully authorized. Rev. Code, 358, art. 1.

It is insisted by the counsel for the appellees that the specific performance of the contract cannot be enforced, on account of the uncertainty of its subject-matter. We think this is the correct view of it; for every agreement which is required to be in writing by the statute of frauds must be certain in itself, or capable of being made so by reference to something else, whereby the terms can be ascertained with reasonable precision; otherwise it cannot be carried into effect. *Abeel v. Radcliff*, 13 Johns. 297; Fry on Specific Performance, 166.

Oral evidence is inadmissible for the purpose of supplying an omission in an instrument where written evidence is required by law, because to admit it would virtually be to give to oral the superior force of written evidence, and occasion that to pass by parol, which, by law, ought not to pass but by writing. And it is upon the same principle inadmissible to give any effect to a written instrument, which is void in law for uncertainty. 3 Starkie's Ev 1000; *Woollam v. Hearn*, 2 White & Tudor's Lead. Cas. in Eq. 589

It is well settled both in England and in this country, that under the statute of frauds there can be no specific execution of a contract in respect to land, unless the parties have described and identified the particular tract which is to pass from one to the other; or unless the contract furnishes the means of identifying with certainty the land to be conveyed. 1 Sugden on Vendors, 118; *Blagden v. Bradbear*, 12 Ves. 466; *Reed's Heirs v. Hornback*, 4 J. J. Marsh, 377, *Allen v. Bennett*, 8 S. & M. 681.

In the case of *Wilkinson v. Davis's Administrator*, the court says: "That every contract or deed for the conveyance of land must define its identity and fix its locality, or there must be such a description of the land as, by the aid of parol evidence, will readily point to its locality and boundaries. But if the contract is void by reason of the uncertainty in the description of the subject-matter, parol evi-

dence is not admissible to supply the omission." Freem. Ch. 58. A receipt for a sum of money, expressing that it was the cash part of the purchase of a lot of land, without specifying the terms of the contract, is not such a memorandum as will take the case out of the statute against frauds and perjuries. *Ellis v. Deadman's Heirs*, 4 Bibb, 466; *Allen v. Bennett*, 8 S. & M. 681.

It seems to be well settled, that direct evidence of intention, as contradistinguished from evidence to show the intent expressed by the words or language of an instrument, is inadmissible. Extrinsic evidence is admissible only to *construe* and *apply* the terms of the writing. The rule in such cases confines the inquiry to the *meaning of the words used*; and hence all extrinsic evidence tending to prove, not what the party *has expressed*, but what *he intended to express*, is obviously calculated to throw no light on the real matter in dispute.

In the case at bar, there is nothing in the receipts to point out or locate the lot, nor is there any thing referred to therein to identify it, or by which its location can be ascertained. They are too vague and uncertain to be the foundation of a decree. It has been held by the supreme court of the United States, that if the land granted be so inaccurately described as to render its identity wholly uncertain, the grant is void. *Boardman v. The Lessees of Reed*, 6 Pet. 545; 1 Greenl. Ev. 350, § 301.

The agreement in this case is too indefinite and uncertain to authorize a decree for specific performance of it; and to let in parol testimony to supply the omission in the agreement would be to allow that to pass by parol which by law ought not to pass but by writing, and would open the door to all the mischiefs intended to be provided against by the statute.

This court has repeatedly decided, that a bill to enforce a parol contract for the sale of land cannot be maintained in this state, and that part performance will not take a parol sale of lands out of the statute of frauds. The statute contains no exceptions in regard to such contracts, and it is not for us to create exceptions where none exist in the statute. *Beaman v. Buck*, 9 S. & M. 210; *Box v. Stanford*, 13 id. 93.

For these reasons we think the court below did not err in sustaining the demurrer and dismissing the bill.

The decree will therefore be affirmed.

Summers and Brannin v. Roos & Co.

SUMMERS & BRANNIN *et al.* v. ROOS & CO.

(42 Miss. 749.)

Trust deed—Future advances—Junior creditors.

R. & Co., having a debt against B., attached certain property then in possession of H. by virtue of a deed of trust executed to him by B. in favor of S. & B., and, as appeared on the face of the instrument, to secure the payment of a \$40,000 note. It appeared from an agreement bearing the same date, that the trust deed was intended to secure future advances as well as present liabilities; of which agreement the attaching creditor had no knowledge. The trustee gave a bond, and the right of property was tried. *Held*, that the deed of trust was valid, although it did not show upon its face that it was to secure future advances, and that the possession of the trustee was good against the claim of R. & Co., whose demand was contracted subsequent to the recording of the deed.

CREDITORS' attachment. The facts are stated in the opinion. The instructions referred to are as follows:

1. If the jury believe, from the evidence, that the deed of trust in question was made with a view to protect Baggett in any way from his creditors, it is void, and the claimant acquired no rights under it, and they should find for the plaintiff in the attachment.

2. If the jury believe the deed was made for fraudulent purposes, it is void; and they should certify in their verdict that it was made for fraudulent purposes, and assess the value of the property replevied by the claimant.

3. A mortgage or deed of trust made to secure future advances must make that fact distinctly appear on the face of the deed, or it is void as between third parties who claim without actual notice of the intentions of the grantor and grantee in the deed of trust.

To these charges plaintiffs in error excepted.

Plaintiffs in error asked the following charges, which were refused, and an exception taken:

15. That the plaintiffs in execution are bound to make out their case, and to show, by testimony, that the certain property levied on is subject to the attachment; and if they should believe, from the evidence, that only a portion of the property is so subject, and that it is not shown by testimony what specific portion or articles are so subject, then they should find a verdict for the claimants.

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16. The retention of the deed of trust by Summers & Brannin, from the 19th day of December to the 30th day of January, is not, of itself, evidence of a fraudulent intent by the parties to the deed, if the evidence shows that the deed was made *bona fide*, and not intended to defraud creditors.

The sixth instruction was modified by the court (the modification is embraced in brackets), and plaintiffs in error excepted:

6. If the jury believe, from the testimony, that the debt of A. Roos & Co. was not contracted until the 14th of February, 1867, and that the deed of trust was recorded before that date, on the 30th of January, 1867, then the deed of trust [if the note it was intended to secure was for a debt then due] was notice to them, and they cannot set up that they had no notice of its existence.

W. & J. R. Yerger, for plaintiffs in error.

W. P. Harris and *J. B. Chrisman*, for defendants.

SHACKELFORD, C. J. On the 20th day of March, A. D. 1867, the defendants in error filed, in the circuit court of Lawrence county, their affidavits, in which it is alleged that William P. Baggett, of said county, is indebted to them in the sum of \$5,370.06, and that said Baggett "has property and rights in action which he converts, and unjustly refuses to apply to the payment of his debts; that he has assigned and disposed, or is about to assign or dispose, of his property or rights in action, or some part thereof, with intent to defraud his creditors, or give an unfair preference to some of them; and that he has converted, or is about to convert, his property into money or evidences of debt, with intent to place it beyond the reach of his creditors;" and thereupon the usual attachment was sued out by the defendants in error against the estate of said Baggett, and placed in the hands of the sheriff of said county, and by him it was levied upon certain real estate and personal property, as the property of the said Baggett, on the 20th day of March, 1867.

On the 30th day of March, 1867, J. J. B. Hilliard made affidavit before the clerk of the probate court of said county, that the goods, wares and merchandise attached as aforesaid by the sheriff, on the 20th day of March, A. D. 1867, under and by virtue of the attachment sued out by defendants in error against the estate of said Baggett, belonged to him, and that he was the owner of said prop-

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erty as trustee under a deed in trust, executed on the 19th day of December, A. D. 1866, by the said William P. Baggett to him as trustee, for the use of Summers & Brannin; and prayed for the possession of the property. Claimant Hilliard executed bond, and the property so attached was delivered up to him by the sheriff. About the same time, other creditors, who are named in the record, attached the same property as the property of Baggett in controversy in the case under consideration. An issue was made up at the May term, 1867, of said circuit court, to try the right of property, and the case submitted to a jury. Before the trial of the right of property, judgment was obtained at the May term, 1867, upon the debt of defendants in error, and upon the claims of the other attaching creditors of Baggett; all of which judgments were read at the trial. The jury found a verdict for the plaintiff in attachment, and assessed the damages, or value of property attached, as \$11,012.69. A motion was made for a new trial by the claimant, which was overruled by the court, and exceptions taken to the ruling of the court, and brings the case here by writ of error.

The grounds for the motion of a new trial are:

1. Because the verdict is against the evidence and instructions of the court.
2. Because the court erred in refusing to grant the fifteenth and sixteenth instructions asked by the claimant.
3. The court erred in modifying the instructions asked by the claimant.
4. The court erred in giving the first, second and third instructions asked for by the plaintiff in attachment.

The *first* error assigned is the refusal of the court to grant a new trial to the plaintiffs in error; which we shall now proceed to consider. On the trial, the deed in trust executed on the 19th day of December, 1866, by William P. Baggett, to J. J. B. Hilliard, trustee for the parties, was read to the jury with a paper of even date, signed by Summers & Brannin and William P. Baggett; duplicates having been signed, one delivered to Baggett, and the other retained by Summers & Brannin. In this deed, certain real and personal estate is conveyed, transferred and sold to the said J. J. B. Hilliard, to secure the payment of a note for the sum of \$40,000, executed and delivered by Baggett on the 19th December, 1866, to Summers & Brannin, and due and payable ninety days from date, payable

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at the Canal Bank of New Orleans. In this deed, conveying real and personal estate to Hilliard, is included the stock of goods, wares and merchandise then in the store of the said Baggett, in the town of Brookhaven. It is further provided, that, in case Baggett failed to pay the said note at maturity, then the said J. J. B. Hilliard is to take possession of the personal estate, and sell that on ten days' notice, and the real estate on thirty days' notice; the cotton embraced in the deed in trust was to be immediately shipped by Baggett to Summers & Brannin.

The concurrent paper above referred to is in substance, that there was a large unsettled balance between said Baggett and Summers & Brannin, growing out of various assignments of cotton by Baggett to them, and various advances of money by them to Baggett; and that they contemplated a continuance of like transactions between them up to the maturity of said note, and it being uncertain what may be the balance due them by said Baggett to them; and that the object of the said note and of said deed in trust is to secure the balance that may be due by Baggett to Summers & Brannin at the maturity of said note.

It is further provided therein, that Summers & Brannin are to advance to the said Baggett \$70 per bale, in cash and groceries for such cotton as he may, before the *maturity* of the said note, purchase or trade for, and consign to Summers & Brannin; it is further provided, that it was not to include any of the cotton embraced in the deed of trust, "or any of the cotton expected of Larkin." It is shown that Baggett owed Gartman & Strickland \$1,000 for cotton, and "which Baggett is to make all reasonable efforts to pay out of his own means;" if he could not, Summers & Brannin are to advance the amount on the receipt of the cotton.

Summers & Brannin obligated themselves to take up Baggett's acceptances in favor of his New York creditors to the amount of \$8,000, about to fall due before the first of January, 1867, and Baggett's draft in favor of J. Bloom & Co., of New Orleans, for \$3,500, and pay \$500 or \$1,500 for groceries, Baggett's purchases in December, 1866; all of which are to be placed to the debit of Baggett, on his account with Summers & Brannin.

On the maturity of the said note of \$40,000, the said Summers & Brannin are to state the account, and the balance due by Baggett, in any thing, to them "will be the amount due them on said note."

The deed in trust was not recorded until the 30th of January, A. D. 1867.

The contract explanatory of the deed in trust was not recorded.

The first objection urged by counsel for defendants in error against the validity of the deed in trust in the record is, that it is fraudulent and void as to Baggett's creditors, because the deed did not express on its face that it was "to secure future advances."

Counsel cite 4 Kent's Com. pp. 176, 177, for authority in support of this position. It is laid down in the text referred to "that a mortgage or judgment may be taken and held as a security for *future advances and responsibilities*, to the extent of it, when this is a constituent part of the original agreement; and the future advances will be covered by the lien, in preference to the claim, under a *junior intervening incumbrance*, with notice of the agreement. The principle is, that *subsequent advances cannot be tacked to a prior mortgage*, to the prejudice of a *bona-fide junior incumbrancer*; but the mortgage is always good to secure future loans, *when there is no intervening equity*.

"It is necessary that the agreement, as contained in the record of the *lien*, should, however, give all the requisite information as to the extent and certainty of the contract; so that a junior creditor may, by inspection of the record, *and by common prudence and ordinary diligence, ascertain the extent of the incumbrance*." "This is requisite to secure good faith, and prevent error and imposition in dealing."

In the case of *Brinkerhoff v. Marvin*, 5 Johns. Ch. 320, Chancellor KENT, deciding the case, says: "A judgment or other security may be taken and held for *future responsibilities* to the extent of it." Referring to the case of *Livingston v. McInlay*, 16 Johns. 165, he says: "The superior court observed that, if it was a part of the original agreement, a judgment may be entered *as a security for future advances beyond the amount then actually due*; in like manner, a mortgage may be held as a security for *future advances*. The limitations to this doctrine, I should think, would be, that when a subsequent judgment or mortgage intervened, *further advances*, after that period, would not be covered." In this case, the purposes of the judgments were expressly declared by concurrent receipts, and their validity (the judgments) sustained by the chancellor.

In this opinion, Chancellor KENT cites the case of *Shirras et al.*
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v. *Craig et al.*, 7 Cranch, 34, as authority, and uses this language in reference thereto: "A mortgage should stand, to secure the real equitable claims of the mortgagee, whether they existed *at the date of the mortgage, or aross afterward, and before notice* of the defendants' equity."

In the case of *Shirras et al. v. Craig et al.*, at the time of the execution of the mortgage, Gardiner, the mortgagor, was supposed to be solvent; and the mortgage was executed in part to secure the payment of *money actually due* at the time and in part to *secure sums to be advanced*, and to indemnify some of the mortgagees *for liabilities to be incurred*. The mortgage was dated the 1st of December, 1801, and recorded on the 14th of September, 1802, and purported, *on its face*, to secure £30,000 sterling, due to all the mortgagees; it was *really intended to secure different sums due at the time* from particular mortgages, and *advances afterward to be made, and liabilities to be incurred*, to a certain amount. Chief Justice MARSHALL, delivering the opinion of the court, held the mortgage to be valid, and affirmed the decision of the vice-chancellor of Georgia, sustaining the mortgage.

There have been repeated adjudications upon the doctrine announced in these decisions, recognizing and approving it, by many of the most enlightened tribunals of last resort in the Union. *Collins v. Castile*, 13 Me. 254; *Craig v. Tappin*, 2 Sand. Ch. 78; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; 15 Ohio, 253; 23 Hen. (S. C.) 14; 30 Barb. 268; *Robinson v. Williams*, 22 N. Y. C. A. 380; 23 Conn. 123; 20 id. 427; *Ball v. Fleming*, 1 Beas. 13; 24 Pick. 274; 8 Bentham, 287; *Mix v. Coles* 20 Conn. 420; 36 Penn. St. 170. These authorities, we think, are conclusive against the objection raised by counsel against the validity of the deed in question; because it is not shown upon its face that it was intended to secure future advances, as well as advances already made. We are, under this view of the law, unable to concur with counsel for the defendants in error, in his construction of the text above quoted from 4 Kent's Com. pp. 176, 177. This refers clearly to the *agreement* entered into between the mortgagor and mortgagee at the time of the execution of the deed intended to secure future advances: in the use of the language, that "this agreement should give all the requisite information as to *the extent* and certainty of the contract." The distinguished commentator only intended to show what it should contain,

and not that it should be placed upon record with the deed, or that it should be embodied in the deed. If he intended to convey any such idea, he would not have said, "that a junior creditor may, by an inspection of the record, and by *common prudence and ordinary diligence, ascertain the extent of the incumbrance.*" This language intimates plainly, that the party wishing to deal with the mortgagor has to go farther than the record to ascertain the extent of the incumbrance.

The deed in trust, or mortgage, being on record, showing a lien for a definite amount, places a party upon his guard; "and by ordinary diligence and common prudence" he could readily have ascertained the extent of the incumbrance, by demanding an inspection of the concurrent contract, entered into at the time of its execution by the parties to the deed. This view of the doctrine laid down in Kent was recognized and affirmed in 3 Barb. Ch. 293, where the court held that it was a sufficient compliance with the doctrine of notice to record a mortgage *in form*, and state a specific sum therein, because this warns the public to the extent of the lien. Hilliard, in his work on Mortgages, also adopts this view as a sound rule. Vol. I, § 46, p. 316, and cases cited.

In the case under consideration, Baggett, as well as Summers & Brannin, had duplicates of the concurrent agreement explanatory of the lien in the deed in trust, which is sufficiently explicit and certain to show the real extent of the lien created in the deed in trust; it is clearly within the rule laid down by Chancellor KENT previously quoted.

The deed of trust in question was placed upon record on the 30th of January, A. D. 1867, and the defendants in error contracted their debts with Baggett on the 13th day of February, 1867, some fourteen days after the deed was placed upon record. The recording of the deed was notice to the world of the incumbrance upon the property conveyed therein by Baggett to the trustee.

The third instruction given by the court to the jury at the instance of the defendants in error, and excepted to by plaintiffs in error at the time, and made by them one of the reasons why a new trial should have been granted, and one of the grounds of error, in plaintiffs' in error second assignment, is in direct conflict with the doctrine of notice, and of the law relative to deeds and mortgages, to secure future advances to grantors, etc. It is in these words:

"A mortgage or deed of trust made to secure future advances must make that fact distinctly appear on the face of the deed, or it is void, as between third parties who claim without actual notice of the intentions of the grantor and grantee, in the deed of trust."

It was error to grant this instruction.

Another position assumed by counsel, in opposition to the enforcement of the deed in trust, is, that it was inoperative, because the amount mentioned in the note was paid off and discharged before the maturity of the same.

This position is solely maintained upon the assumption that Baggett had shipped sufficient cotton to Summers & Brannin, from the date of the deed in trust to the time of the surrender of the property to the trustee, to pay off the \$40,000 note.

It was shown to the jury on the trial, by the testimony of Summers, one of the firm of Summers & Brannin, the *cestuis que trust*, and not denied by Baggett, that the cotton in the hands of Summers & Brannin, at the time of the execution of the deed in trust, was *incumbered* with an advance of \$70 per bale, and the United States tax; and, in addition to this, that Baggett owed them \$60,000 for cash advances previously made to Baggett. Summers & Brannin assumed and paid \$8,000 of Baggett's acceptances in favor of his New York creditors, and the sum of \$3,500 to J. Bloom & Co., of New Orleans, for groceries, and \$500 more for balances due in New Orleans for groceries, etc.; and by the contract, Summers & Brannin advanced \$70 *per bale* on all the cotton subsequently shipped by Baggett to them. The overplus arising above these advances only reduced the \$40,000 note \$9,139.60, leaving a balance due Messrs. Summers & Brannin, at the maturity of the note, of \$30,860.46, on the 16th day of March, A. D. 1867.

The facts developed by this testimony do not warrant this assumption, as there was *no agreement* that this overplus should be applied in the way contended for by counsel.

If the deed in trust under consideration was made *bona fide*, and with no intention to hinder, delay, or defraud existing creditors, as was stated by Mr. Summers and Mr. Baggett to the jury, one being a *cestui que trust*, and the other the grantor in the deed, and was valid at its creation, it cannot be affected by subsequent events; and no subsequent fraudulent or illegal act of the parties can invalidate it. Burrill on Assignments, 442.

But it is insisted by counsel that the deed in trust is void on its

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face, because the grantor, Baggett, was permitted to remain in possession of the personal property intended to be transferred by the deed, including the stock of goods, etc., and to sell them, from the date of the deed to the maturity of the note, and cites us to the case of *Collins & McEvoy v. Myers et al.*, 16 Ohio, 547. There is a material difference between the mortgage in the Ohio case and the deed under consideration: in the first there was a power of sale expressly given to the mortgagor; in the other, the property was only permitted to remain in the possession of Baggett until the condition of the deed was broken, and contains no power of sale to Baggett, expressly or directly given.

In their adjudication upon the mortgage in the Ohio case, the court held that:

. The power of sale contained in the deed was inconsistent with the declared purposes of the deed; that property stood as a security for the debt; which it could not be if the mortgagor was to sell it, and therefore void. But as there is no power of sale in the deed under consideration given to Baggett, we do not consider it void upon its face; and to have it declared void it must be impeached for fraud, by extrinsic evidence, and can be avoided by showing it was given to hinder, delay or defraud creditors. This court has decided that the retention of personal property by the vendor in the case of an absolute sale is not *per se* void, but only *prima facie* fraudulent. *Comstock v. Rayford et al.*, 12 S. & M. 369. And such is the general rule in most of the courts of the Union. But it has been repeatedly decided by this court, that, in the case of a deed in trust or mortgage, a retention of personal property by the mortgagor or grantor, and a stipulation in it that it should retain possession until, by the terms of the deed, he should be surrendered for sale, for the satisfaction of the debt secured, is not *prima facie* fraudulent, but, being consistent with the instrument, is entirely legitimate and proper. *Bogard v. Gardly*, 4 S. & M. 302; *Harvey v. Park*, id. 229. In the latter case, the grantor, Wall, executed a deed in trust to indemnify his securities, on an administration bond; and conveyed to Park & Clifton all his land and negroes, all his household and kitchen furniture, his horses and mules, and farming utensils, and crops of cotton to be afterward raised, with a reservation to himself of possession of the property, but it is insisted by counsel, that, inasmuch as the evidence showed that Summers & Brannin permitted Baggett to sell and dispose of the goods, wares and merchandise in

the deed, this fact of itself is *per se* fraudulent. It may be a circumstance from which a jury might infer fraud, and it may be *prima facie* fraudulent, or it may have been innocently or carelessly done on the part of both contracting parties, without an intention to defraud any creditor; and the question, whether there was a fraudulent intent in the creation of the deed was a question for a jury alone (where the deed was not fraudulent upon its face), and the court could not determine it. Keeping in view the principle, that if there was no fraud in the creation of the deed, if the grantor Baggett had paid the proceeds of the goods sold by him, embraced in the deed in trust, to the extinguishment of his indebtedness to Summers & Brannin, were they not legitimately applied? If they were not applied to the payment of Baggett's debts to Summers & Brannin, they were the only parties defrauded. Certainly, if Baggett had sold all the goods embraced in the deed, and applied the proceeds to the extinguishment of his indebtedness to Summers & Brannin, defendants in error could not complain, and they could not set up this fact to show a fraudulent intent to defraud them on the part of Baggett, or the *cestuis que trust* in the deed. In the case in 16 Ohio, above referred to, the court says: "That the mortgagee should permit the mortgagor to transact business for his own benefit, and not *proceed* to collect the *mortgaged debt*, would not be evidence of fraud which would authorize the mortgagee to be defeated, upon the ground that it hindered or delayed creditors; because the mortgage may have been honestly executed, and simple generosity, or good nature, or carelessness in *delaying* the collection of a debt, could not be regarded as a *fraud* which would defeat an honest security."

In the case at bar, there was no delay on the part of the *cestuis que trust* to have their deed enforced; they proceeded to have it executed by the consent of Baggett before the maturity of the \$40,000 note, it having been shown that Baggett ceased to ship any cotton to Summers & Brannin after the 1st of February, A. D. 1867. Still, Summers & Brannin, carrying out their contingent obligation to pay the balances to be paid Gartman *et al.* in their contract, in the failure of Baggett to pay out of his own funds, transmitted \$3,000 for that purpose to Baggett, after Baggett ceased to ship cotton to them. Shortly after this time the *cestui que trust* opened negotiations with Baggett, to get his consent for the sale of the property embraced in the deed, previous to the maturity of the

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\$40,000 note. This consent was not procured until the 16th of March, 1867, when Baggett made and executed, in the presence of witnesses, a transfer of all the goods in his storehouse to J. J. B. Hilliard, the trustee, and with the transfer delivered possession of the goods in the presence of witnesses. *Delay* cannot be urged as a ground of fraud, in connection with the permission of Summers & Brannin to Baggett to sell the goods, as was urged in the Ohio case.

As we have before stated, the question arising out of the circumstances under which the deed in question was executed is one of fraud or no fraud against the defendants in error, and a question of fact for the jury, and not for the court. This court, in the case of *Gilliam v. Moore*, 10 S. & M. 130, has held that it is erroneous for the court to assume that fraud in fact exists, and this error will not be cured because the record seems to make out a case of fraud; the jury have a right to pass upon the question, and it is neither for the court below nor the high court of errors and appeals to preclude them from the inquiry. *Id.* 130. It will be observed that Hilliard, the trustee, had been in possession of the goods, etc., four days before they were attached by defendants in error as the property of Baggett. On this state of facts, if it were true, that deed contained a power of sale by the grantor, and was therefore void as to creditors who might obtain a lien upon the goods while in the possession of Baggett, and before the trustee took possession, yet Roos & Co., who only levied their attachment four days *after* the trustee took possession, and at that time being creditors at large, without a lien of any kind, cannot maintain their right under their attachment levied after Hilliard, the trustee, had obtained possession, under the transfer executed by Baggett on the 16th day of March, 1867. The identical question was decided in the case of *Foster v. Saco Manufacturing Company*, 12 Pick. 451. In that case the deed in trust stipulated that the grantor should remain in possession of all the property, *and sell and dispose of all the personal property, according to the usual course of their business, unless the trustee should be of the opinion that the safety of creditors required them to take immediate possession.* Chief Justice SHAW, delivering the opinion of the court, said that "the first obvious remark upon the facts of the case is, that the assignment, as to the personal property, was inoperative, and void against *any creditor who should have attached before the trustee took posses-*

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sion. The stipulation that the vendors should remain in possession, and have the use of the property, would have rendered it void as against creditors.

"But it was a good executory contract, and when the property was actually taken in pursuance of its terms, the sale became complete. The possession accompanied and followed the deed." *Bartelle v. Williams*, 1 Pick. 288. The deed also contained a provision that after-acquired property should be subject to its provisions, on a contingency and for certain purposes expressed in it. Speaking in reference to such property, he says: "The same principle applies to the property to be acquired after the date of the deed. It was a good executory contract between the parties for a future sale, by deed, to take effect and become executed upon a contingency. The possession was taken pursuant to the contract, and with the consent of the vendors the sale, as between the parties, was complete."

He then proceeds to declare that the attaching creditors had no right to interfere. This case would be decisive of the one now under consideration against the defendants in error, even if the deed contained an express stipulation that Baggett "should continue to sell the goods embraced in the deed in trust." The doctrine announced in the cases in 1 and 12 Pick. 288 and 451, is clearly applicable to the state of facts existing at the date of the levy of the attachment of defendants in error, the sale having been complete to the trustee before that time. The deed is regular on its face, and if impeachable for fraud, it had to be done by testimony *aliunde* the deed. What the jury might have found on an issue to that effect this court cannot know. They are precluded from the privilege of determining that question by the first and third instructions given to them at the instance of the defendants in error. The first is in these words: "If the jury believe from the evidence that the deed in trust in question was made with a view of protecting Baggett in any way from his creditors, it is void, and the claimants acquire no right under it, and they should find for the plaintiffs."

The rule announced in this instruction is too broad, and could do nothing less than mislead the jury. The court omitted to state in the instruction the *fraudulent intent*, which is essential to avoid conveyances of this kind. Baggett had a right to prefer his creditors. Summers & Brannin were his creditors to the extent of a

cash balance due them of \$60,000, and it was lawful to secure them for this indebtedness, and for that he was about to create with them, by conveying his property for that purpose; if the conveyance was made for this purpose, and not with the intent "to hinder, delay or defraud" his other creditors, the conveyance is valid, although it was made to protect Baggett's property from other creditors. That being the object and purpose for which assignments are made preferring creditors, any incidental protection the deed in question may have given Baggett from his creditors, until condition broken, certainly would not render it void as to *subsequent creditors*.

The old common-law rule, holding that a deed fraudulent as to existing creditors is fraudulent as to subsequent creditors, has to be considered in connection with our statute of frauds, which modifies it. It declares that such conveyances shall only be void as against those who are delayed, hindered, in the collection of their debts, etc. This statute has been repeatedly construed to apply only to *existing creditors* by this court. In the case of *Bullett, Miller & Co. et al. v. Taylor & Richardson et al.*, 34 Miss. 708, the judge, delivering the opinion in that case, says: "If it were now an open question, the language would seem to be too clear to admit of construction. The conveyance is void as to all who are, at the time of its execution, in a situation to be injured by it, but valid as to all others. It operates to transfer the property, but transfers it with the incumbrance of the grantor's debts then existing." This adjudication was made upon the statute in Hutch. Code, 638.

No subject has given rise to a greater number of decisions, nor to a greater variety and conflict of judicial opinions, than the construction of the statute 13 Eliz., of which most of the statutes of frauds of the different states of the Union are substantial copies. The statute in Hutch. Code, 638, adjudicated upon by this court in the case of *Bullett, Miller & Co. v. Taylor et al.*, is nearly a transcript from that of 13 Eliz. The rulings of this court upon this statute, as to the effect of it upon the *rights of subsequent creditors*, where the deed has been declared void as to existing creditors, have not been uniform.

In the case of *Henry v. Fullerton*, 13 S. & M. 634, which was a case of a subsequent creditor, the court held, "that, if a subsequent creditor can show *actual fraud* as to existing creditors, the deed would be void as to such subsequent creditor."

In 14 S. & M. 142, the court, quoting *Henry v. Fullerton*, the
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above language, said: "The language is very general, and it is difficult to extract any entirely definite rule. It seems, however, beyond doubt, if the party is *insolvent at the time of making the voluntary conveyance*, it is void as to subsequent creditors." In the case of *Winn v. Barrett*, 31 Miss. 657, this rule is modified in this case, the court holding, that "if it do not appear that the debts existed at the time the disposition of the property was made, the transaction cannot, as a general rule, be said to be fraudulent as to creditors," and giving the same construction to the statute as in the case of *Bullett, Miller & Co. v. Taylor & Richardson et al.* Judge FISHER, delivering the opinion of the court, goes on to say: "It is true that it has been held, in some cases, that where a conveyance by a debtor was fraudulent in its inception, as to his creditors at the time, it will be so treated as to subsequent creditors. But these cases must rest upon one of two principles: the property was either so situated that it enabled the debtor to obtain credit upon the faith of it; or the fraudulent vendee was regarded as trustee under the secret arrangement between the parties, and in virtue of such secret understanding, bound, at least so far as his word or such contract could bind him, to account to the fraudulent vendor; and hence the creditor was allowed to be substituted to what was treated as the substantial interest of his debtor, and subject the property to the payment of his debt."

The statute in Hutch. Code, 638, quoted in the foregoing cases, is literally copied into the Rev. Code, 358, art. 2. But it seems, with a view to settle for the future the construction of our statute of frauds *relative to subsequent creditors*, in art. 3, p. 359, Rev. Code, the legislature, after quoting the statute from Hutch. Code, further restricts the general rule, and declares: "Nor shall it *in any case* extend to creditors whose debts were contracted after such fraudulent act, unless made with *the intent to defraud them*; and though a conveyance or contract be decreed void *as to prior creditors*, it shall not on that account be void as to subsequent creditors or purchasers."

There was no controversy between the *cestuis que trust* in the deed under consideration and *prior creditors*. It was attached on the ground that it was fraudulent as to subsequent creditors. Under the statute of frauds, unless defendants in error could show that the deed was executed by the parties to it, "with the intent" to hinder, delay and defraud them, they had to fail in their attachment on that

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ground. The grantor, Baggett, and Summers, one of the *cesuis que trust*, who had the deed prepared, testified before the jury that the deed was made *bona fide*, and with "no intent to defraud any one." This testimony, taken in connection with all the circumstances at the time of its execution and subsequent thereto, having any legal bearing upon the case, or in any wise tending to show a fraudulent intent on the part of the parties to the same, to defraud the defendants in error, was for the consideration of the jury alone. This instruction, we think, was clearly in conflict with the provisions of art. 3, Rev. Code, above referred to, and unwarranted by the testimony. The second instruction does not announce the law correctly, and is indefinite, and in conflict with the provisions of art. 3, Rev. Code, above quoted. We are, therefore, of the opinion that the second assignment is well taken.

We now come to the consideration of the third assignment of error. It is, that the court erred in refusing the fifteenth and sixteenth instructions asked by plaintiffs in error. The fifteenth instruction is as follows: "That the plaintiffs in execution, A. Ross & Co., are bound to make out their case, and to show by testimony that the certain property levied upon is subject to the attachment; and if they shall believe from the evidence that only a portion of the property is so subject, and that the plaintiffs have failed to show by testimony what specific portion or articles are so subject, then they should find a verdict for the claimant."

It is insisted in behalf of the defendants in error, that this instruction was properly refused, as the rule in claimant cases is, that it is sufficient for the plaintiff in execution or attachment to show that the goods were in the possession of the defendant when levied on; and that creates the presumption that the ownership is with the possession, and that the claimant must then show title, etc. This is a sound rule; but, to make it applicable to the case under consideration, the plaintiffs in attachment or execution had to show that the goods attached were in the possession of Baggett at the time of the levy.

The proof was undisputed, that, on the 16th of March, A. D. 1867, the entire stock of goods levied upon by defendants in error, under their attachments, had been transferred to Hilliard, the trustee, and that he had remained in undisturbed possession of them from that time up to the 20th of March, 1867, the day of the levy.

To do away the effect of this testimony, counsel insist that the

grantor's (Baggett) statement, that Summers & Brannin were to pay him \$3,000 to pay balances due Gartman *et al.*, rescinded the contract of delivery to Hilliard.

Summers stated he had transmitted this amount about the 1st of February, 1867, to pay these balances, and explains the subsequent promise to Baggett to pay these balances, by stating that it was contemplated by the parties to sell the stock of goods to one Millsaps. This sale fell through. If it had not fallen through, *three thousand dollars' worth of notes* of Millsaps were to be transferred for that purpose. This promise does not appear in the written transfer to Hilliard, the trustee. If it depended upon the condition stated by Summers, and was to be paid only in case the sale was made to Millsaps, this transfer could not be affected by the failure of Millsaps to purchase the goods. But, if this sum was to be paid in any event, then Baggett can hold Summers & Brannin liable to pay the \$3,000 for the use and benefit of Gartman *et al.* It is a matter the defendants in error cannot avail themselves of to avoid the transfer to Hilliard, the trustee. It is a contract entirely between Summers & Brannin and Baggett, with which the defendants in error are not in any wise pecuniarily interested. It was purely a question of fact for the consideration of the jury, whether Hilliard was in possession of the goods, by virtue of the written transfer of the 16th of March, 1867, from Baggett to him, on the 20th day of March, 1867; and if they believe that possession was complete in Hilliard, it was incumbent upon the plaintiffs in attachment to show what property levied upon was subject to their attachment. For these reasons, we think the proof in the case warranted the instruction, and it should have been given, and it was error to refuse it. The giving or the refusal of the sixteenth instruction, in either event, could not have affected the verdict of the jury. The twelfth instruction given for the claimant is in effect the same as the sixteenth instruction; in the absence of the twelfth, the sixteenth should have been given.

We have arrived at the fourth and last assignment of error, which is: "That the court erred in modifying the sixth instruction asked by plaintiffs in error, and giving the same as modified, and refusing to give the same without modification." The modification complained of is in these words: "If the note it was intended to secure was for debts then due." We think this modification was erroneous, for the reasons given in our consideration and disposition of

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the question raised upon the third instruction given for the plaintiffs in attachment; the instruction should have been given without modification, and it was error to refuse it. It necessarily follows, from these views of the questions considered, that the verdict must be set aside.

Let the judgment be reversed and a new trial awarded.

FONDA, appellant, v. JONES.

(42 Miss. 732.)

Vendor's lien — waiver of by taking security.

The taking by the vendor of lands of the note of the purchaser, with a third person as surety thereon, is *prima facie* evidence of a waiver of the vendor's lien for the purchase-money, but it may be rebutted by satisfactory proof of an express agreement that the lien should be retained.

THE appellant and wife sold and conveyed to Dickson Priddy certain land situated in Tallahatchie county, and took his two certain promissory notes under seal, commonly called bills single, with Cullen McCullin as surety therein, payable to the appellant, for the two last installments of the purchase-money. The said bills single not being paid, the appellant filed his bill against the appellees in the chancery court of said county of Tallahatchie, to enforce the vendor's lien on said land for the unpaid purchase-money. The bill alleges that, at the time of the sale and conveyance as aforesaid, there was a distinct understanding between the appellant and said Dickson Priddy that the vendor's lien should be retained on said land as a security for the payment of the said notes, the said Cullen McCullin being joined with said Dickson Priddy in the same as additional security for their payment. To this bill of complaint the appellees, Sarah Jones and Thomas Jones, filed their demurrer, which was sustained by the court, and the bill dismissed. And from this decree the cause is brought into this court by appeal.

PEYTON, J. The doctrine of the vendor's lien is a highly equitable one, and eminently consistent with the most perfect notions of moral justice. It has existed in the English equity courts for cen-

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turies. It has been adopted in most of the American states whose equity systems may be regarded as at all settled, and in the national courts. This lien prevails against the vendee and all persons claiming under him, except mortgagees and *bona fide* purchasers for valuable consideration without notice; and such purchaser must be a purchaser from the grantor, and not a purchaser at execution sale.

The question of the vendor's lien has generally arisen, not from a general denial of the doctrine, but only of its application to the particular case under consideration, in consequence of an alleged *waiver* of the lien by some act of the party claiming it. The rule in this respect is to sustain the implied lien when the vendor has taken the mere personal security of the purchaser only, and to consider any bond, note, or covenant given by the vendee alone as intended only to countervail the receipt of the purchase-money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the equitable lien; and, on the other hand, to consider the lien as waived, whenever any security is taken on the land, or otherwise, for the whole or any part of the purchase-money, unless there is an express agreement that the equitable lien on the land shall be retained. This constitutes a safe rule, easily understood, and which we consider as established by a weight of authority in this country which is not easily shaken.

The taking of the note of the purchaser, with a third person as surety thereon, is evidence of a waiver of the lien. But that evidence may be rebutted by satisfactory proof that it was intended that the vendor should retain his lien. At all events, it is *prima facie* evidence of a waiver, and the *onus* is on the vendor to prove by the most cogent and irresistible circumstances, that it is not to have that effect. 2 Washburn on Real Property (3d ed.), 91; *Boon v. Murphy*, 6 Blackf. 272; *Way v. Patty*, 1 Car. (Ind.) 102; *Campbell v. Baldwin*, 12 Humph. 248, 258; *Mims v. Macon and Western R. Co.*, 3 Kelly, 333, and *Baum v. Grigsby*, 21 Cal. 172.

The weight of the authorities is clearly in favor of the opinion that the law gives no lien in favor of the vendor of the estate where the note or bond of the vendee, with a third person as security, is taken for the purchase-money, unless there be an express agreement that the lien shall be retained. And as, in the case under consideration, the bill avers that there was such an agreement, we are of opinion that the defendants should answer. For this reason we

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think the court below erred in sustaining the demurrer and dismissing the bill.

The decree must be reversed, the demurrer overruled, and cause remanded, with leave for the defendants to answer the complainant's bill of complaint within sixty days from this date.

ROBINSON, appellant, v. HARBOUR.

(42 Meas. 797.)

Covenant on sale of land.

H. sold to R. lands at an agreed price, part of which was paid in cash and R.'s note given for the balance. H., at the same time, executed and delivered his bond conditioned to make title to R. when said note was paid. H. afterward assigned the note before its maturity to M., who brought action thereon after maturity. R. demurred on the ground that no deed of the land had been tendered. *Held*, that the covenant in the note and that in the bond were dependent, and that the demurrer was well taken. See *Bowen v. Bailey*, *ante*, where the converse is held by the same court.

THE case is stated in the opinion.

D. E. Thomas, for appellant.

Walthall & Golladay, for appellee.

PEYTON, J. In this case it appears that, on the 16th day of December, 1859, one John J. Hall bargained and sold to Eliza Robinson certain land, situate in the county of Yallobusha, for the sum of \$2,440, one-half of which was paid in cash at the time of the sale, and for the other half she executed her promissory note, of that date, payable to the order of said Hall on the first day of January, 1861; and that the said John J. Hall, at the same time, executed and delivered to the said Eliza Robinson his bond, conditioned to make her a title to said land when said note for the balance of the purchase-money was paid, and placed her in possession of the land, which she has retained ever since.

On the 3d day of February, 1860, the said Hall assigned the said note, for value, to M. H. Harbour, who filed his bill in the chancery

court of said county of Yallobusha to subject the said land to the payment of the said note. To this bill the defendant, Eliza Robinson, demurred, on the grounds of the want of equity on the face of the bill, and that the complainant had not made or tendered to her a deed for the land and demanded the purchase-money, so as to put her in default before filing said bill. The demurrer was overruled by the said court, and the appellant brings the case to this court, and assigns for error the action of the court in overruling the defendant's demurrer to the complainant's bill.

There is no doubt that the vendor of land, who has taken the notes of the vendee and given bond, conditioned to convey the title when the purchase-money is paid, can, by an assignment of the notes, pass his lien for the purchase-money, and that the assignee may proceed in equity to subject the land to the payment of his debt. *Tanner v. Hicks*, 4 S. & M. 294, and *Terry v. George*, 37 Miss. 539.

The main question presented by the record for our determination is, whether the covenants of the vendor and vendee in this case are dependent or independent covenants? And, upon this subject, it must be conceded that there has been considerable oscillation of the judicial pendulum, and, what is much to be regretted, a great want of uniformity and harmony in the decisions of our own courts. Knowing the necessity of some certain, intelligible and correct rules with respect to the construction and character of covenants in agreements, we have given this subject that thorough investigation and mature consideration which its importance demands. The order of time in which covenants are to be performed is an important consideration in determining whether they are dependent or independent. And the rule seems to be clear and indisputable that where there are several covenants, which are *independent* of each other, one party may bring an action against the other for breach of his covenants, without averring a performance or tender or offer of performance of the covenants on his part; and it is no excuse for the defendant to allege in his plea a breach of the covenants on the part of the plaintiff. But, where the covenants are *dependent*, it is necessary for the plaintiff to aver and prove a performance, or tender and offer to perform his part of the agreement, and demand performance by the other party of his part of the agreement, to entitle himself to an action for the breach of the covenants on the part of the defendant. The difficulty lies in the application of this

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rule to the particular case. It is justly observed that covenants are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties and the good sense of the case, and technical words should give way to such intention. In order, therefore, to discover that intention, and thereby to learn, with some degree of certainty, when performance is necessary to be averred in the declaration, and when not, it may not be improper to lay down a few rules which will, perhaps, be found useful for that purpose, as follows: 1. If a day be appointed for payment of money or part of it, or for doing any other act, and is to happen, or may happen, *before* the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act *before* performance; for it appears that the party relied upon his *remedy*, and did not intend to make the performance a condition precedent; and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act. 2. But when a day is appointed for the payment of money, or for doing any other act, and the day is to happen *after* the thing which is the consideration of the money or other act is to be performed, no action can be maintained for the money, etc., *before* performance. 3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be compensated in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. 4. Where the acts or covenants of the parties are concurrent, and to be done or performed at the same time, the covenants are dependent, and neither party can maintain an action against the other, without averring and proving performance on his part.

When tested by these rules, it will be found that the broad doctrine laid down by this court in the cases of *Clopton v. Bolton*, 23 Miss. 78, *McMath v. Johnson*, 41 id. 439, and others based upon their authority, cannot be sustained. These cases hold, that where the vendee of land executes his notes to secure the payment of the purchase-money in installments, and takes a bond from the vendor, conditioned to make title when the last installment is paid, the covenants are independent, and the vendor may enforce payment without performance, or an offer and tender of performance, of his part of the agreement. These cases, it is believed, are founded on a

mistaken view of the cases of *Gibson v. Newman*, 1 How. 341, and *Coleman v. Rowe*, 5 id. 460.

In the case of *Gibson v. Newman*, the vendee of a lot of ground in the city of Vicksburg executed his note for \$1,800, payable in three annual installments, and the vendor agreed to make him a good title to the lot. But there was *no time* fixed for the making of the title; and for that reason, the covenants of the parties were independent covenants, and were very properly so declared by the court. And the report of the case of *Coleman v. Rowe* is very unsatisfactory, as it does not show when the bill was filed — whether on the maturity of the first installment, or after all the installments had become due, and seems to have been founded on the case of *Gibson v. Newman*, which, as we have shown, does not sustain the doctrine enunciated in the cases of *Clepton v. Bolton* and *McMullh v. Johnson*.

Where the vendee of lands covenants to pay for the same by installments, and the vendor covenants to make him a title when the last installment is paid, the covenants of the vendee to pay the installments, except the last one, are independent covenants. But the covenant of the vendee to pay the last installment and the covenant of the vendor to make title are dependent covenants; and to entitle either of them to maintain an action against the other, he must aver and prove performance, or tender or offer of performance, of his part of the agreement. The payment of this installment of the money, and the making of the title, are concurrent acts of the parties, to be done or performed at the same time, and are therefore dependent covenants. This rule is sustained by reason and authority, and accords with the justice of the case and the intention of the parties.

Suppose the whole of the purchase-money had been payable at once, instead of being payable by installments, and the stipulation had been to pay three thousand dollars in twelve months, the deed to be executed at the payment; upon this statement of the question, is there a doubt that the agreements would have been mutually dependent and conditional? And what difference is there, whether the final payment is the whole or part? Where the whole of the purchase-money is to be paid at once, and the deed is then to be given, the covenants are held to be dependent, because it is unreasonable to presume that the purchaser intended to pay the whole consideration, without having the equivalent, in a title to the land

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purchased. The same reason applies to the last installment. An obvious reason why the prior installments should be paid without having a deed is, that the vendor was to withhold the title, as a security for the purchase-money, and the vendee was content to rely on the vendor's contract for his future title; but no such reason applies to the final and complete payment of the purchase-money. Whether we consider the particular language, or the general intent of the parties, the covenants between them were mutually dependent and conditional, and the vendor cannot recover without averring performance or an offer to perform on his part. *Kane v. Hood*, 13 Pick. 281; *Kunkle v. Johnson*, 30 Ill. 328, 332.

This court has repeatedly decided that the vendor of land, who has given bond to make title to the vendee on payment of the purchase-money, cannot maintain a bill for the specific performance of the contract until he has put the vendee in default by a tender of a deed. The covenants to make title and to pay the money are concurrent, mutual and dependent; and neither party can insist on a performance of the contract without an offer or tender of performance on his part; and this rule applies with equal force in law and equity. *Mobley v. Keys*, 138, and 1 M. 677; *Eckford v. Halbert*, 30 Miss. 273; *Klyce v. Broyles*, 22 id. 524; and *McAlister v. Moye*, id. 258.

Courts will construe covenants to be dependent, unless a contrary intention clearly appears. A party shall not be forced to pay out his money unless he can get that for which he stipulated. *Stockton v. George*, 7 How. 172; *Peques v. Mosby*, 7 S. & M. 340, 347; *Wadlington v. Hill*, 10 id. 560; *Bank of Columbia v. Huguer*, 1 Peters, 455, and 2 Wend. 297.

The cases of *Leftwich v. Coleman*, 3 How. 167, and *Rector v. Price*, id. 321, referred to in *McMuth v. Johnson*, do not support the doctrine laid down in that case. Upon reference to them, it will be found they were both cases of independent covenants. In the first case a note was given for land, payable on a day fixed, and *before the time* the deed to the land was to be executed; and, in the other case, there was *no time* fixed for procuring the deed, which was the consideration of the note sued on in that case.

The case of *McMuth v. Johnson* was correctly decided upon the facts of the case. But it lays down a doctrine to which we cannot give our assent, and relies upon the case of *Clopton v. Bolton* as an authority conclusive to show that the covenants of an agreement

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are all independent, where the conveyance is to be made upon the payment of the last installment of the purchase-money. In that case the court say: "On the one part, there were instruments for the payment of the purchase-money at several different periods; on the other, an obligation to make title upon full payment of the purchase-money. Suppose the suit had been brought as soon as the first installment fell due, would it be contended that the plaintiff should make a deed before he could recover that installment in the face of his obligation to make title when all the money was paid? Clearly not. This shows beyond doubt that the covenants were intended to be independent." With all due respect, we think this is a *non-sequitur*, a conclusion not warranted by the premises. The fact that some of the covenants in an agreement are independent does not necessarily render others so. *Grant v. Johnson*, 1 Seld. 247, and *Babcock v. Wilson*, 5 Shep. 372.

The case of *Clifton v. Bolton* was an action on two writings obligatory, payable twelve and twenty-four months after date, given for the purchase of a tract of land. The defendant pleaded that fact, and that the plaintiff, at the time of the contract, executed a bond to make title when the purchase-money should be paid; and that the plaintiff did not, before the bringing of the suit, tender a deed to the defendant for the land. The court decided that the covenants were independent, and that the failure to tender the deed constituted no bar to the action.

It has been held that a covenant to pay a certain sum of money, one-half on a certain day, and the other half on a certain subsequent day, at which time the covenantee was to execute and deliver a deed, so far as respects the first payment, is independent, but, as to the other, is dependent; and, in an action thereon, the tender of the deed must be averred. So, in a declaration for the whole sum, after both installments have become due. *Biddle v. Correll*, 3 Har. 377, and *Leonard v. Bates*, 1 Black. 172.

In contracts where either party might be compelled to part with his money or his property, without receiving the stipulated equivalent, the latest and best action of the courts has been to hold that the party seeking to enforce the contract must make his own part of the agreement precedent, and allege either a performance or a tender and refusal. *Wadlington v. Hill*, 10 S. & M. 562. And a mere offer to make a deed and averment of readiness at all times to make it, will not do. *Klyce v. Broyles*, 37 Miss. 524.

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This principle applies in all cases to the last installment where the vendee gives the vendor his notes to secure the payment of the purchase-money, payable at different times, and takes from the vendor a bond for title when the money or last installment is paid. For it is not to be presumed that the vendee intended to pay his money without receiving the stipulated equivalent in a title to the land purchased, nor that the vendor intended to part with the title to the land sold, without receiving the money. The conveyance and the last payment were intended to be simultaneous acts.

We have arrived at the conclusion, that, in this case, the covenants between the assignor of the appellee and the appellant were dependent covenants, and that the appellee could not maintain his bill without averring and proving a performance of the covenant on the part of the vendor, or tender or offer to perform, before the filing of the bill. The averment in the bill that the assignor of the note is ready and willing to execute a deed on payment of the purchase-money is not sufficient to sustain it. And for this reason, we think the court below erred in overruling the demurrer to the bill.

SHACKELFORD, C. J., dissenting, declines to write a dissenting opinion, but refers to the case of *Bowen v. Bailey*, for his views on the question decided in this opinion. The decree must be reversed, the demurrer sustained, and the bill dismissed.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

SMITH, plaintiff in error, v. BRAZELTON.

(1 Heiskell, 44.)

Trespass — Belligerent rights.

In an action of trespass for inducing confederate soldiers to cut and take plaintiff's timber, etc., it appeared that the plaintiff and defendant owned adjoining farms; that during the war the surrounding country was at times occupied by the confederate army, which, on one occasion, cut a large amount of valuable timber from plaintiff's farm, and took and used other of his property at the suggestion and by the advice, as was alleged, of the defendant, who sympathized with the confederate cause. *Held*, that the cutting of the timber and taking of the property being by virtue of belligerent rights, the plaintiff could not recover.

Held, further, that the belligerent rights of both parties to the war were the same and equal in extent.

DECLARATION in trespass. The parties were the owners of adjoining farms, near the town of New Market, in Jefferson county. In December, 1863, a force of rebel soldiers under the command of General Vaughn, encamped for two or three days, and cut timber, upon the land of defendant in error. In January or February, 1864, a brigade of rebel soldiers under command of Gen. Longstreet, also encamped for about three weeks, and cut timber off said land. The place of encampment was a convenient one, and had been used at different times by troops belonging to the federal and rebel armies. The land, consisting of about ten acres, was very valuable on

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account of timber growing on it; and of this, the federals had destroyed about two and the rebels six acres, leaving two acres standing. On the second occasion, above mentioned, the rebels took some eight acres of standing corn, six or eight hogs, about two thousand pounds of hay, and about twenty dozen bundles of oats, and converted them to their use.

There was some conflict of evidence as to whether the plaintiff in error directed and advised the spoliation of the lands of his neighbor. Verdict and judgment were rendered in favor of defendant in error for \$500 and costs, and the case is before this court upon appeal.

Barton, W. McFarland and J. R. Cooke, for plaintiff in error.

Thornburg, R. McFarland, Meek & Gratz, for defendant.

NELSON, J. (after deciding some questions of evidence). And had it been established by positive proof, instead of conjecture, that the plaintiff in error, discovering that the soldiers were determined to encamp upon his own land, or that of the defendant in error, and *would* take the timber or property of one or the other, informed them that he was a rebel, and the defendant in error was a union man, and actually requested them to take the property of the latter and spare his own, we do not regard it as our duty to hold that he incurred the slightest civil responsibility. An old case, almost analogous in the criminal law, establishes a precedent from which such a conclusion may, without violence, be drawn; for, "where two persons being shipwrecked, have got on the same plank, but finding it not able to save them both, one thrusts the other from it, and he is drowned, this homicide is excusable, through unavoidable necessity, and upon the great universal principle of self-preservation, which prompts every man to save his own life, in preference to that of another, when one of them must inevitably perish." Broom's Legal Maxims, 48; Law Lib., 6, *m*; 4 Black. Com., 186, *m*. But if the law of necessity, as applied to the saving of life, is inapplicable to the preservation of property, we hold, upon the facts of this case, and assuming that the jury were warranted in presuming that the timber was cut, and the other property taken, upon the suggestion or the advice of the plaintiff in error, that he cannot be held as a trespasser, unless it appears that the act done by the party counseled or advised was unlaw-

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ful—a trespass—and subjected him to civil liability. This defense may be relied upon under the plea of not guilty. It is not a technical justification, but a defense growing out of the testimony introduced by the plaintiff below. It is part of the transaction on which his action is founded, and he could not be surprised by the evidence. It falls within the rule laid down in 2 Greenl. Ev., § 94, that “if the act of the defendant was done by inevitable necessity, as, if it be caused by ungovernable brute force, his horse running away with him without his fault; or, if a lighted squib is thrown upon him, and to save himself he strikes it off in a new direction; in these and the like cases the necessity may be shown, under the general issue, in disproof of the battery.” In *Davis v. McMeas*, 8 Humph. 40, which was an action of slander, the defendant was permitted to show, under the plea of not guilty, that the words proved were spoken under such circumstances that they were not actionable; and, we hold in this case, that whether the plaintiff in error acted under inevitable necessity or otherwise, if the acts established by the proof against him were not unlawful, he may rely upon this defense, under the general issue. See, also, *Gibbons v. Tarter*, 5 Sneed, 644.

The question then recurs: Was the plaintiff in error a trespasser upon the facts proved in the case, and liable to a civil action? We answer it by declaring that the act of taking and using wood for fires for an army, under the circumstances of this case, is an act justified by the usages of war; that it grows out of an absolute necessity—a necessity that, so far as we know, was never doubted or questioned, as justifying the federal army, under similar circumstances; and this presents the question as to whether, in the recent war, there was any difference in the rights of the two belligerents as to what acts each might perform, in the prosecution of the various operations of the war in which they were engaged. The solution of this question depends upon various considerations; and, as there are other cases before us in which similar cases are presented, we proceed to state our conclusions, and the process by which we have arrived at them, at greater length than would otherwise seem to be demanded by the circumstances proved in this case. Aware that some conflict has existed, and still exists, in judicial opinions, as well as in the legal profession, in regard to various questions arising out of the war, and differing, as we do, to some extent, from the views promulgated by our immediate

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predecessors, it is alike respectful to others, and just to parties litigant, that the reasons for our conclusions should be presented with more than ordinary elaboration.

When the framers of the constitution of the United States conferred upon congress the power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," and when congress passed the act of 1795 (chap. 36, 1 U. S. Stat. at Large, 424), and the act of 1807 (chap. 39, 2 id. 443), authorizing the president to call forth the militia, and employ the land and naval forces for the purpose of executing the laws and suppressing insurrection, it cannot be reasonably supposed that either the members of the convention or of congress had it in contemplation that any insurrection or rebellion would ever attain the gigantic proportions of the late civil war; and, consequently, no provision was made for the contingency of a civil war, in contradistinction to an insurrection or rebellion, as defined by Vattel and recognized by the supreme court of the United States in *The Prize Cases*, 2 Black, 667, 668. In the absence of any constitutional provision or congressional enactment, the courts and the text-writers have resorted to the law of nations for the purpose of obtaining a solution of the difficult questions growing out of the war; and, in the case cited, which was determined while the war was pending, the contest was declared to be, not an insurrection or rebellion merely, but "the greatest civil war known in the history of the human race." Id. 699. In that case it is said, that, "under the very peculiar construction of this government, the citizens owe supreme allegiance to the federal government; they owe, also, a qualified allegiance to the state in which they are domiciled. Their persons and property are subject to its laws. Hence, in organizing this rebellion, they have acted *as states* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the federal government. Several of these states have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign state. Their right to do so is now being decided by wager of battle. The forts and territory of each of these states are held in hostility to the general government. *It is no loose, unorganized insurrection*, having no defined boundary or possession. It has a boundary marked by lines of bayonets, and which can be crossed only by force; south of this line is enemies' territory, because it is

claimed and held in possession by a hostile and belligerent power." 2 Black, 673, 674.

Vattel, whose work on the Law of Nations is of the highest authority, says that, "when a nation becomes divided into two parties, absolutely independent, and no longer acknowledging a common superior, the state is dissolved; and the war between the two parties stands on the same ground, *in every respect, as a public war between two different nations*. Whether a republic be split into two factions, each maintaining that it alone constitutes the body of the state, or a kingdom be divided between two competitors for the crown, the nation is severed into two parties who will mutually term each other rebels. Thus, there exists in the state two separate bodies who pretend to absolute independence, and between whom there is no judge. They decide their quarrel by arms as two different nations would do. The obligation to observe the common laws of war toward each other is, therefore, absolute; indispensably binding on both parties, and the same which the law of nature imposes on all nations in transactions between state and state." Vat. Book III, chap. 28, pp. 426, 427, § 295.

It is thus shown that a civil war is, in its technical sense, a *public war*; and that, while it continues, the belligerents, so far as the laws of war are concerned, maintain the same relation toward each other as independent nations in a public or regular war. The same great author says there are certain rules adopted by the voluntary law of nations, which may be briefly stated as follows: 1. That regular war, *as to its effects*, is to be accounted just on both sides. 2. That the justice of the cause being reputed equal between two enemies, *whatever is permitted to the one, in virtue of a state of war, is also permitted to the other*; and 3. That this voluntary law of nations, which is admitted only through necessity, and with a view to avoid greater evils, does not, to him who takes up arms in an unjust cause, give any real right that is capable of justifying his conduct and acquitting his conscience, but merely entitles him to the benefit of the external effect of the law and to impunity among mankind. Id. pp. 382, 383, book III, chap. 12, § 191. And in the same book (chap. 13, § 195, p. 385), it is repeated that, "by the rules of the voluntary law of nations, every regular war is, on both sides, accounted just, *as to its effects*, and no one has a right to judge a nation respecting the unreasonableness of her claims, or what she thinks necessary for her own safety."

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It follows, therefore, that although municipal rights of sovereignty remained in the United States during the late civil war, and could be re-asserted whenever and wherever the government was successful in arms, yet, while the war was pending, and wherever the government was unable to assert its authority, the belligerent rights of parties to the war were precisely the same, and neither could, lawfully, assert any belligerent right superior to or different from the other. It is granted, in the prize cases, that these rights were mutually conceded in the late civil war; and so much of the opinion in *Post v. Stout*, 4 Cold. 208, as assumes or seems to assume that belligerent rights were *accorded*, from motives of humanity and policy, and as a concession by the government of the United States alone, is founded in error, or should be qualified by the statement, that, soon after the commencement of the war, the United States recognized it as a civil war, in which belligerent rights existed under the law of nations. It is well known, that, in the commencement of the late civil war, the president of the United States was disposed to treat as traitors all who were acting under authority of the confederate states. In the earlier stage of the war the government refused to agree upon a cartel for the exchange of prisoners, and it was declared in Mr. Lincoln's proclamation, of 19th April, 1861, that any person who should molest a vessel of the United States, under the pretended authority of the confederate states, should be held amenable to the laws of the United States for the prevention and punishment of piracy, 12 U. S. Stat. at Large, 1258, 1259. Under this proclamation, certain privateersmen, acting under commissions from the president of the confederate states, who were captured by the United States, were taken into New York and Philadelphia, and indicted for piracy. Four of them were convicted in Philadelphia, but never sentenced; while, in New York, the jury could not agree. These arrests led to retaliatory action on the part of the confederate states, and in consequence of their threat to execute an equal or greater number of prisoners, if the so-called pirates were punished, and also, in consequence of remonstrances of the British government, the government of the United States, on the 31st January, 1862, virtually receded from its position. See *Law. Wheat.* 253 (2d ed.); *Tenney's Mil. and Nav. Hist.* Reb. 61. After various negotiations, a cartel for the general exchange of prisoners was finally agreed upon, on the 22d of July, 1862; and, under its provisions, those who were at

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first treated as pirates were exchanged. M. and N. Hist. R. 323; 4 Law. Wheat. 593. The confederate government, on all occasions, negotiated with that of the United States, for the exchange of prisoners, on terms of perfect equality; and, in consequence of its ability to marshal large armies, the war, to all intents and purposes, was treated and carried on by both belligerents as a public war, in which each asserted and maintained for the time being the same belligerent rights. But we have been unable to find in any work to which we have access, any clear, concise, certain and accurate definition of the nature and extent of belligerent rights, as understood by writers on international law, and can only deduce them from the usage of nations and their general exercise under the laws of war.

During the existence of the civil war between Spain and her colonies, and previous to the acknowledgment of the independence of the latter by the United States, the colonies were deemed by them belligerent nations, and entitled to all the sovereign rights of war, against their enemy. 3 Wheat. 610; 4 id. 52; 7 id. 337; Law Wheat. 42, 43. Among these sovereign rights of war may be classed the right to attack and capture or destroy the persons and property of the enemy; to destroy his commerce; to despoil and plunder his territory; to levy contributions; and to put in practice, against him, every method known in civilized warfare, necessary to weaken him. 1 Kent, lect. V., 90-101, Vattel, book III, chap. 8, pp. 346-363.

Every nation, at war with another, is justifiable, by the general and strict law of nations, in seizing and confiscating all movable property of its enemy, of any kind or nature whatsoever, wherever found, whether within its territory or not; but the general usage now is, not to touch private property on land, without making compensation, unless in special cases, dictated by the necessary operations of war, or when captured in places captured by storm, and which repelled all the overtures for capitulation. 4 Kent, 91-92, *m*; *Ware, adm'r, v. Hylton et al.*, 3 Dal. 199; 1 Pet. C. R. 104.

This usage was adopted in the earlier stage of the Mexican war, in the instructions to General Taylor to abstain from appropriating private property to public use, until purchased at a fair price; but was departed from, and military contributions levied, before the close of the war. 1 Kent, 92, 93, *m*, in note. And it was notoriously departed from by the army of the United States, in every southern state, during the late civil war, and the private property

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of the citizens, whether friendly or unfriendly to the government, was taken and appropriated to the uses of the army, in most cases, without any compensation. The departure from this usage on the part of the United States would have justified the other belligerent—the confederate states—in the adoption of a similar course, in regard to the private property of any of the citizens of the United States residing out of the limits of the confederacy, but would not have justified taking, without just compensation, the private property of any citizen of the confederate states, except in cases justified, as a military necessity, by the usages of war; because the confederate states, as a *de facto* government, were bound to protect their own citizens. Their right to follow the example of the United States depended upon their equal rights as belligerents, and upon the law of retaliation. But, whatever may have been the actual practice of the two belligerents, there is no difficulty in ascertaining the laws of war as recognized by the United States. In the “Instructions for the government of the armies of the United States in the field,” prepared by Francis Lieber, LL. D., approved by the president, and published by order of the secretary of war April 24, 1863, general orders, volunteer force, § 2, ¶ 37, p. 70, it is declared that “the United States acknowledge and protect, in hostile countries occupied by them, religion and morality, strictly private property, the persons of the inhabitants, especially those of women, and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished. This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, *especially* houses, lands, boats or ships, and churches, for temporary and military uses.” In the same book, p. 68, ¶ 22, it is declared that “the principle has been more and more acknowledged, that the unarmed citizen is to be spared in person, property and honor, *as much as the exigencies of war will admit*,” thus leaving a large margin to military necessity; and on p. 67, ¶ 17, it is said, “war is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.” And in the further progress of the war, Major-General Halleck, commander-in-chief of the armies of the United States, issued certain stringent instructions to the commanding officer in Tennessee, in which, among other things, he said: “You have already been urged to procure your subsistence, forage and means

of transportation, so far as is possible, in the country occupied. This you had the right to do without any instructions. As the commanding general in the field you have the power to enforce all laws and usages of war, *however rigid and severe these may be*, unless there be some act of congress, regulation, order or instruction forbidding or restricting such enforcement." LEE. Wheat. (2d ed.). supplement, 40. Such being the laws of war, as recognized and promulgated by the United States, we hold that, during the war, it was lawful for the armies of General Vaughn and General Longstreet to encamp upon the lands of defendant in error, and to cut down and consume the timber therefrom; that said military commanders in active service were the proper and only judges of the propriety or necessity of taking and consuming the other property mentioned in the pleadings, and that, if it was lawful in them to take, it was lawful for the plaintiff in error, who was then within their lines, and sympathized with their objects in the war, to advise the taking; and that, in this view, no trespass was, either in law or in fact, committed. How the law would be if it were shown that the party giving the advice was animated solely by malicious motives, or personal hatred or revenge; or how it would be if there had been any proof that plaintiff directed the seizure of the corn, hogs and hay, it is unnecessary for us to determine, as there is no proof in the record to require such determination.

The right of the United States, through the army, to take and appropriate private property, in the late civil war, was fully discussed and carefully considered in *Taylor v. N. & C. R. R. Co.*, 6 Cold. 650, and it was held that even in friendly territory, the right exists under the general powers of the government; and that the military commander is the proper judge of the necessity, and cannot be held responsible, in a civil tribunal; and, for the reasons already stated, we hold that, during the late civil war, the same principle was applicable to the armies of the southern confederacy. In the case just cited, the right of the government to take and impress private property, for the use of an army in the field, and upon the actual theater of military operations, was fully considered in the learned opinion of the court. It was rested upon the police power of the nation, and declared to arise from its obligation to protect the national existence and the lives and property of its citizens: and, while the duty of the government to make compensation to those whose property has been taken and appropriated to public

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use was distinctly recognized, it was held that this is not a condition precedent to the right to take property, or to the vesting of title thereto in the government. Id. 651.

The duty of making compensation to their own citizens was, at all times, fully recognized and enforced by the government of the confederate states of America, and never departed from, so far as we are informed, except under the pressure of military necessity, and by armies engaged in actual hostilities. Citizens were paid for their property from the commencement of the war, and the right of impressment was regulated by statute. An act was passed by the congress of the confederate states, approved March 26, 1863, entitled, "an act to regulate impressments;" and this was amended by an act approved April 27, 1863, and still further amended by an act approved February 16, 1864. These acts provided for the impressment of private property, and its fair valuation in cases where the impressing officer and the owners could not agree, and for payment to the owner. Regulations were prescribed, from time to time, by the war department of the confederate states, for carrying said statutes into effect; and, so late as March 7, 1864, in the regulations issued by "S. Cooper, adjutant and inspector-general," it was directed in section six that "no officer or agent shall impress the necessary supplies which any person may have for the consumption of himself, his family, employees or slaves, or to carry on his ordinary mechanical, manufacturing or agricultural employments."

In the constitution of the United States, article 5, it is provided that private property shall not be taken for public use without just compensation, and the same provision was contained in the constitution of the confederate states, article 1, section 16.

It will thus be seen that both belligerents acknowledged in their fundamental law the duty of making compensation; and this has always been considered as in affirmance of a great doctrine, established by the common law, laid down by jurists as a principle of universal law, and founded on natural equity. Story Const., § 1790. But while the lawful government of the United States and the *de facto* government of the confederate states mutually acknowledged, at least in theory, the application of this principle to their own citizens, the stern and rigorous doctrine recognized in the law of nations, that all movable property of their enemies, including private property, may be seized or destroyed, was practically adopted by both belligerents; and, as has been already announced, we hold

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that, in the late civil war, each party belligerent was entitled to the same belligerent rights. This doctrine is fully recognized, not only in the authorities before cited, but in Lawrence's *Wheaton*, 521, 522, text, and 523 in the notes, and is incidentally stated in Halleck's *Int. Law*, 458, 459, 464. It was declared, in another form, by the supreme court of the United States, long before our civil war, in the case of *The Santissima Trinidad and the St. Andre*, 7 Wheat. 283; 5 Pet. C. R. 284. There it was held that, during the existence of the civil war between Spain and her colonies, and previous to the acknowledgment of the independence of the latter by the United States, the colonies were deemed by us belligerent nations, and entitled, so far as concerns us, to all the sovereign rights of war against their enemy. And, in two cases determined by the court of appeals of Kentucky in 1866, the same general principle was asserted and enforced. In the one, it was held that the capture of horses for the public use of the confederate army, under military authority, express or implied, however wrongful in fact, was excusable as a lawful exercise of a belligerent right. *Price v. Poynter*, 1 Bush (Ky.), 327. In the other it was announced that the admitted laws of all civilized warfare entitle each party in a civil war to the same right of capture or destruction of enemies property, and show that when either the capture or destruction of property by one of such belligerents is lawful, it is equally lawful by the other; and if unlawful by one, it would be equally so by the other. *Bell v. Louisville and Nashville R. R. Co.*, 1 Bush (Ky.), 404.

It was declared by this court, in *Hammond v. The State*, 3 Cold. 236, that in the late civil war the people were separated into two distinct and hostile societies, each, as belligerents merely, standing on the same level, and entitled, pending the contest, to the same rights of war, as against each other, that they would have been entitled to, had they both been independent sovereigns; and that they could alike take prisoners, capture property belonging to each hostile party, and deal with combatants, for the time, wherever the armies marched, as two sovereign and independent states. We fully approve the principle as there stated. The doctrine seems to have been greatly modified in *Yost v. Stout*, 4 Cold. 205, where it was held that Yost and other confederate soldiers, who had taken the wagon and mules of Stout, by order of the commander of the rebel force, were trespassers, and that the order was no justification. The case of *Yost v. Stout*, and the cases of *Davidson v. Manlove*, 2

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Cold. 346, and *Wood v. Stone*, id. 370, seem also to be in conflict with *Hammond v. The State*, and so far as they and similar cases in Coldwell's reports are opposed to the views presented in this opinion, are overruled. The case of *Fottrell v. German*, 5 Cold. 580, in which it was held that a note executed by a confederate surgeon, for the rent of a hospital building, was not illegal and void, as being in aid of the rebellion, is approved, so far as it goes, and it might, perhaps, be rested on firmer ground. The cases of *Wright and Cantrell v. Overall*, 2 Cold. 336, and other cases in which it was held that the confederate or rebel government was not a *de facto* government, are overruled, so far as they are not in unison with this opinion. The doctrine that the rebels were insurgents, merely, and that the government of the confederate states of America was not a *de facto* government, involves, perhaps, the consequence that the United States might be liable to foreign governments, and, possibly, to their own citizens, for all their acts and liabilities, and we are not disposed to yield our assent to a doctrine fraught with consequences of such gravity and importance. Were it an original question, we would, without hesitation, declare that a government which assumed to form a constitution, had a president and cabinet in actual authority, a congress that enacted laws on most subjects of national legislation, and published them in due form and enforced them; which was recognized as a belligerent power by two of the greatest nations on earth; was enabled to issue and keep afloat a currency; set on foot a navy that harassed the commerce of the United States throughout the world; marshaled immense armies; fought great battles, and kept the power of the United States at bay for four years, — was, to all intents and purposes, a *de facto* government; and that it required no recognition on the part of the government of the United States, to establish a fact well known to millions of people, and which will be transmitted to future ages, in every truthful history that has been or may be written of the war. But, for the present, we are satisfied to declare that *Wright & Cantrell v. Overall* is in conflict with *Thorington v. Smith*, decided by the supreme court of the United States, and reported in 8 Wall. 1-15, where the government of the confederate states is expressly held (9, 10) to have been a *de facto* government, or at least a government of paramount force. See *Sherfy v. Argenbright*, *post*.

Let the judgment of the circuit court, in this case, be reversed, and the cause remanded.

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SHERFY, plaintiff in error v. ARGENBRIGHT *et al.*

(1 Holskell, 128.)

Confederate money — validity of contracts based on.

A trust deed contained a power to sell real estate in payment of a note made in 1863, in consideration of "confederate treasury notes," and renewed in 1865. *Held*, that neither the deed nor the note was void.

BILL, praying that a trust deed and a note be declared void, etc. The facts are stated in the opinion.

S. T. Logan, for plaintiff in error.

A. J. Brown and J. G. Deaderick, for defendants.

SHIELDS, Special J. The bill in this cause charges, that on July 4, 1863, the complainant and Jacob Garst made to the defendant, David Argenbright, their note for \$770, due at one day, and payable "in the currency of the country, when called for;" and that the said note was made in consideration of "confederate treasury notes." It is further charged, that on August 17, 1865, the said note was renewed by the complainant, together with one H. M. Rose, the new note being of the sum of \$866.25, due at one day; that on September 7, 1865, the complainant conveyed to the defendant Fain, *in trust*, certain real estate, in the bill described, with a power to sell, for the purpose of securing the payment of the last-mentioned note, and that the trustee, in pursuance of the said power, was about to sell the land.

It is assumed in the bill that the alleged consideration for which these notes were made was of such a character as to vitiate them, and also the conveyance in trust, made to secure the payment of the note last made; and the prayer of the bill is, that said note and the said deed in trust be declared void, and that the defendants be enjoined from enforcing payment of the same by a sale, under the trust deed, or otherwise. To this bill the defendants filed a demurrer, the ground of which seems to be, that the parties were *in pcri delicto*, and that the court should not interpose. The demurrer was overruled; and, in our view of the case, it is unnecessary to consider whether the order of the court, in this particular,

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was correct or not. The defendants answered, and substantially deny that the consideration on which the note was made was "confederate treasury notes;" and much proof was taken on this controverted question of fact.

Upon the hearing of the cause in the court below, the chancellor held that the proof sustained the allegations of the bill; and in this, we think, his conclusion was correct. But the chancellor further held, that the legal consequence of this fact — that the note was made in consideration of "confederate treasury notes" — was, that the said note and the said deed in trust were null and void, and that the complainant was entitled to the injunctive relief prayed for, and he decreed accordingly.

It clearly appears from the record, that the transaction out of which this controversy arises had no connection whatever with the civil war that at the time was flagrant; that the use of the "confederate treasury notes" by these parties, as a circulating medium, was not for the purpose of giving them circulation, or sustaining their credit as money or the representative of value, with a view to aiding the power that issued them, in the pending struggle. The intentions and objects of the parties were innocent; the business in which they were engaged was not in contravention of law, public policy or sound morals; but finding in circulation a species of paper currency, freely passing from hand to hand, having a value in fact, and answering the demands and meeting the conveniences and the daily necessities of trade, and recognized as lawful money by their *state* government — the circulation of which was then being enforced by said government, and also by another and more general government, then in existence, under the authority of which they were living — they used this paper currency to their mutual advantage, subsistence, benefit and profit — the one party *actually* parting with, and the other party *actually* receiving, a certain available value, convertible into whatever was needed to sustain life and make it comfortable, or, if desired, into land or gold, for the purpose of a permanent and safe investment.

This is the whole case, upon the facts; and the question presented for our consideration is, was the conclusion of law drawn by the chancellor correct? The question involved is not a new one in this court. Soon after the close of the late war — so soon, that we may almost say, in the midst of arms — the cases of *Right & Cantrell v. Overall*, 2 Cold. 336, and of *Thornburg v. Harris*, 3 id. 157, were

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decided. In these cases, and in several subsequent cases, *Hale v. Sharp*, 4 id. 275; *Fain v. Headerick*, id. 327, among the number, it was held, that contracts of this character were utterly null and void, because the said treasury notes were issued by an unlawful and treasonable organization, to aid its treasonable purposes and designs; and because every individual, in passing and receiving them, gave aid and comfort to the enemies of the government. 3 id. 163. In other states, where these notes were put in circulation, and answered the purposes of trade and commerce, and where men, under the stress of the circumstances by which, "in the course of human events," they were surrounded, and in obedience to laws then and there being rigidly and irresistibly enforced, sold and became the owners of permanent and valuable property, in consideration of them, which they still hold and enjoy, a widely different view of the question has been taken; and those who borrowed and, in fact, had received the value of them, were held to account for that value, whatever it was. These latter decisions were also made soon after the close of the war, and have since been constantly adhered to as being sound in law and morals.

It may be true, as remarked by a very eminent judge and jurist, in a late case in the supreme court of the United States, that the judgment of courts in times of great civil commotion are of but little authority, on a reconsideration of the question, under circumstances less calculated to disturb and sway the course of thought and reason. Be this as it may, the tribunals of last resort in these states have differed, and established, within their respective jurisdictions, a painful conflict of judicial rulings, the more distressing, because the question is one that greatly affects the interests of the people of many states, and may be considered as one of national interest and importance.

It is certainly to be desired that the rule should be the same wherever its application is called for; that the same measure of justice should be meted to every citizen of the same general government. Under our national organic law this is always attainable, when the question is one that strictly arises under the constitution and laws of the United States; and we hold, that, in a case like the one now before us, which involves a question directly affecting the citizens of so many of our states, that, although a ruling of the supreme court of the United States is not absolutely binding on the state courts, yet, that it is entitled to the very highest respect,

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and, with rare exceptions, should be accepted and adopted by them. Entertaining these views, we, in the midst of these conflicting judgments, in the several states in the south, turn to the tribunal of last resort under the constitution and laws of the United States, as an arbiter, the award of which we are disposed to follow, unless that award is so repugnant to authority, reason and principle that our deliberate judgments and dispassionate views of morality and law forbid us to do so. And that court having held, in the cases of *Thorington v. Smith*, and of *Dean v. Younell's Adm'r*, the one from Alabama, and the other from the state of Georgia, reported in 8 Wall. 1 and 14, the decisions having been made some years after the close of the war, that, in the absence of fraud, and where there was no intention to give currency to the notes in aid of the rebellion, or to otherwise aid the rebellion, and the contract was made in the usual course of business, and within the so-called confederate states, it will be enforced, and the party required to pay the value, in fact, at the time and place, although the contract was for the payment of confederate treasury notes; and we, believing that the holding in these two cases is not repugnant to, but in accordance with, and well sustained by, authority, reason and principle, adopt these judgments as being founded upon the sounder rule in law, and as being in harmony with sound morality, and, as a consequence, expressly overrule all of our cases in which a contrary doctrine has been held.

In the case of *Thorington v. Smith*, approved in *Dean v. Younell's Adm'r*, the validity of these contracts was affirmed on two grounds. First, that the paper was issued and imposed on the community as currency by irresistible force. Second, that in using it, the parties had no actual intent to further insurrection.

Judge Chase, in delivering what appears to have been the unanimous opinion of the court, says: "There are several degrees of what is called *de facto* government." Such a government, in its highest degree, assumes a character very closely resembling a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their place, and so becomes the actual government of a country. The distinguishing characteristic of such government is, that adherents to it in war against the government *de jure* do not incur the penalties of treason; and, under certain limitations, obligations assumed by it, in

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behalf of the country or otherwise, will, in general, be respected by the government *de jure* when restored." But he denies that the confederate states was a government of this kind, because it succeeded in establishing its authority only over a portion of the territory of the government *de jure*.

But, he continues: "There is another description of government, called, also, by publicists, a government *de facto*, which might, perhaps, be more aptly denominated a government of paramount force. Its distinguishing characteristics are: First, that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful government; and, second, *that while it exists, it must be obeyed in civil matters, by private citizens, who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrong-doers, for those acts, though not warranted by the laws of the rightful government.* Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered, *also, by civil authority*, supported more or less directly by military force." It is, then, expressly held that the government of the confederate states belonged to the latter class, that is, though not a government *de facto*, in the highest degree, it was a government of paramount force, and that "*obedience to its authority, in civil and local matters, was not only a necessity, but a duty,*" and that "*without such obedience, civil order was impossible.*"

After stating the fact that confederate notes, while the war lasted, had a contingent value, and were used as money in all their business transactions, by many millions of people, Judge CHASE states the conclusion of the court in the following language: "It seems to follow, as a necessary consequence, from this actual supremacy of the insurgent government as a belligerent, within the territory where it circulated, and, from the necessity of civil obedience on the part of all who remained within it, that this currency must be considered in the courts of law, in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency cannot be regarded, for that reason only, as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile government, whether invading or insurgent

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They are transactions in the ordinary course of civil society, and though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation."

To this reasoning we are compelled to give our assent. But while we thus fully concur in the conclusion, we cannot fully agree with the learned judge in his premises. In our opinion, the distinction taken between a government *de facto* and a government of paramount force is merely nominal, and not founded on a substantial difference. We cannot agree that the usurping government must have expelled the lawful government from its entire territory before it becomes a government *de facto*, nor that, to constitute it such, it is necessary that its existence should be acknowledged by either the government *de jure* or foreign governments. It may be a historical fact that all the instances of governments *de facto* that have existed involved the total subversion for the time of the government *de jure* throughout its entire territory. But this does not affect the reason of the law applicable to such governments in fact, which is, as we understand it, that, being of irresistible force and power, and some government being better than none, the citizen is excused and justified in obeying its laws, civil and military, and cannot be questioned for doing so by the government *de jure*, when restored to its rightful dominion and authority. The matter is thus strongly stated by Blackstone: "When, therefore, a usurper is in possession, the subject is excused and justified in obeying and giving him assistance, otherwise, under a usurpation, no man would be safe if the lawful prince had a right to hang him for obedience to the powers that be, as the usurper would certainly do for disobedience. Nay, further; as the mass of people are imperfect judges of title, of which, in all cases, possession is *prima facie* evidence, the law compels no man to yield obedience to that prince whose right is, by want of possession, rendered uncertain and disputable till Providence shall think fit to interpose in his favor and decide the ambiguous claim." See, also, Vattel, 97, 98, 99.

As to the value and authority of the opinion of this great commentator on the principles of common law, we deem it proper to here quote from the opinion of Judge MARSHALL, perhaps the greatest

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legal mind that this country has produced, in the celebrated treason case of Burr, as follows: "The superior authority of adjudged cases will never be controverted. But those celebrated elementary writers, who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster and Blackstone are not lightly to be regarded. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterward carried to the bar, the bench and the legislature, and," he adds, "are entitled to much respect."

Now, we ask, what possible difference can it be to the citizen or subject—and the whole question relates to him and his rights—whether the usurper has possession of the whole territory of the government *de jure*, or only of that portion of it where he resides and inhabits? Is he not as much subject to, and as much bound to yield obedience to, the "powers that be," and does not the reason of the law apply as strongly in the one case as in the other? We, of course, do not mean to say that the reason of the law calls for its application to ordinary insurrections. But when a political power, in fact, is set up and established, with well-defined territorial limits, having a regular civil and military government, orderly, complete and efficient in all its parts—its legislative department enacting laws, which are duly promulgated; its executive department executing those laws, with unquestioned and unquestionable authority; its judges, everywhere, in the exercise of the functions of their offices, and an army in the field, capable, for the time being, to maintain the existence and absolute authority of the whole governmental fabric, to the entire exclusion of the power of the government *de jure*, although such government, in fact, may not have extended or assumed to extend its authority over the whole of the territory of the government *de jure*, yet, to all persons within its limits, it is, to all intents and purposes, a present, existing, omnipotent, military and political being; and all the principles applicable to the questions that spring inevitably from the existence of a government *de facto* come into active operation, and become "the law of the case." It is a maxim, that like reason doth make like law; and, it has been well said, the law consists not in particular instances and precedents, but in the reason of the law; for reason is the life of the law.

But, conceding that the confederate states did not constitute a

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government *de facto* in the highest degree, and can only be regarded as "a government of paramount force," these transactions in confederate notes had the sanction, authority and enforced circulation, of governments *de facto*, according to the most stringent and restricted idea and definition of such a government. Before the war the several state governments were, unquestionably, governments *de jure*, to which their citizens owed allegiance, and which were endowed, under the constitution and laws of the United States, with a sovereignty that enabled them to pass laws defining and punishing acts of war and resistance against them as high treason. These state governments had and exercised immediate authority over the persons and property of all their citizens. The power of the state government was at the door of every citizen; its "dignity" constantly before him, and he dwelt continually within the shadow of its "peace." It was the municipal law of his state, administered and enforced by the judicial and executive officers of his state, that he studied, read and comprehended, and that protected him in the enjoyment of life, liberty and private property. And when these state governments, through and by their legislative and executive officers, attempted to sever the bonds that bound them to the general government of the United States, and to become, as states, component parts of the revolutionary government of the confederate states of America, they passed laws requiring their citizens to withdraw their allegiance from the government of the United States, and yield it to the government of the confederate states. They required their judges and all other officers to take oaths to support the constitution and authority of the confederate states, which they did; and those officers actually exercised the functions of their several offices under that government. They passed laws requiring their citizens to render military service to the confederate states, and rigidly enforced their execution. And what is more pertinent, if possible, to the present discussion, they enacted laws recognizing confederate treasury notes as a lawful currency and representative of value.

Now, grant that from and after May 6, 1864, as has been declared, the state government of Tennessee was a mere usurpation, an unlawful and treasonable organization, yet it was a fact that existed; it was a government that enforced its laws; it was a government that actually, in the language of Judge CHASE, expelled the regular and lawful authorities from their customary seats and

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functions, established itself in their place, and so became the actual government of the country. In the language of Blackstone, a usurper was in possession, and the right of the lawful authorities, by want of possession, was rendered uncertain and disputable. *It* was, therefore, a government *de facto*, "in the highest degree," so closely "resembling the lawful government," that "the mass of the people," looking only to the possession, and being permitted to look only to the possession, were, by every law, human and divine, bound to yield to it their obedience in both civil and military matters, and are "excused and justified" in doing so.

But we will not pursue the discussion of this branch of the question any further. It is unnecessary to do so, as the authority which we adopt in settling this vexed question in our state, arising out of transactions in confederate notes, holds, that the paramount power under which they were issued and placed in circulation, be its proper name what it may, was sufficient to now sanction such contracts in law. But it is very clear to our minds, that, if the distinction taken by Judge CHASE were substantial, and if it were necessary to uphold these contracts and to do justice that they should have had, at the time they were made, the sanction of a government *de facto*, "in the highest degree," and exactly analogous to the European instances, such a government, to say the least of it, and granting that it was a usurpation, existed in the state government of Tennessee during the late war.

It has been frequently held, that, if the contract do not grow out of the illegal act, and is wholly unconnected with it, and is not a part of the original scheme, and founded on a new consideration, it is not tainted by the illegal act, although it may be known to the contracting parties. Nor does it make any difference, that such new and independent contract is made with the person who is the contriver and conductor of the original illegal act, if it is wholly disconnected therefrom. *Armstrong v. Toler*, 11 Wheat. 261, 262; *Brooks v. Martin*, 2 Wall. 70. In the case of *Orchard v. Hughes*, 1 Wall. 75, which was a suit brought by Hughes to foreclose a mortgage, Orchard set up, by way of defense, that a part of the consideration of the mortgage consisted of the bills of a bank that had not been legally chartered, which was a device to deceive the public, and which bills were fraudulently put into circulation, and were of no validity and value; but on it being made to appear that the bills were current, and in circulation at the time they were received, and

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had a value in fact, and were actually used by the borrower, in the payment of his debts, it was held, that the defense was not sufficient. It is, therefore, clear, that the two cases, in 8 Wallace, are well sustained by authority on this point, and we are also well satisfied with the manifest justice and reason of the rule.

We are fully impressed with the importance of uniformity of decision, acknowledge the soundness of the doctrine of *stare decisis*, and admit the evils that attend a constant fluctuation in judicial opinion. Precedents should, as a general rule, be duly regarded and implicitly followed. But there are cases that have been so ill-considered, and that are so palpably wrong, that it becomes the duty of a succeeding court to overrule them. Such cases have been frequently overruled, both in this country and England; Mr. Greenleaf has published an entire volume of them; and Judge KENT said that he knew more than one thousand cases that had been overruled, doubted or limited in their application. The language of Sir William Jones, in his essay on bailment, is, therefore, too strong, when he says, "no man who is not a lawyer would ever know how to act; and no man who is a lawyer would, in many instances, know what to admit, unless courts were bound by authority, as firmly as the pagan deities were supposed to be bound by the decrees of fate." 1 Kent, 477.

Where a decision, or a series of decisions, have established a rule of property, and, more particularly, a rule affecting title to real estate, which has become generally known and been acted upon, such a land-mark should not be disturbed. But where there is no such restraining consideration; where the thing determined is of recent origin, not supported by former precedents, but contrary to the highest and most respectable authorities of other states, and of the United States; where the decision has not met the approbation of the profession at large, nor of the people; where it is clearly repugnant to the principles of common justice, and has had the practical effect to enable one man to take an undue advantage of another; such decision, or series of decisions, should be examined without fear and revised without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. 1 Kent, 477; HAYWOOD, J., in *Barton v. Shall*, Peck, 231, 232.

For these reasons we feel warranted in departing from the past course of decisions in this state, on the "confederate money ques-

tion," and in adopting the doctrine asserted with so much force of reason in the national tribunal of last resort. In doing this, we, in fact, produce uniformity of decision. We but make the rule the same in our state courts with the rule in the federal courts sitting in our state, and with the courts in our sister states. In doing so, we do no one any harm. The question is not one of that character that disturbs a land-mark of property, or a right vested or acquired, under the former decisions; at least not any that is founded in justice or right. It is true, many demands of this character have passed into judgment against them, for which there is now no remedy; but that is no reason why other parties should be denied their right to receive the actual value of that which they parted with, to another's profit to that extent, at the time and place.

The state of the pleadings in this cause do not require any adjudication as to the measure of damages to be recovered in an action founded upon a contract to pay confederate notes, and we consequently make none.

The decree of the chancellor will be reversed and the bill dismissed.

NOTE.—The validity of contracts made within the territory of the "confederate states" during the war, based upon confederate money as a consideration, was also maintained by the same court at the same time in the case of *Naff v. Crawford*, 1 Heiskell, 111.—REP.

GIRDNER, plaintiff in error, v. STEPHENS.

(1 Heiskell, 280.)

Constitutional law—Statute of limitation—power to divest right under.

After a cause of action has become barred by the statute of limitation, a defendant has a vested right to rely upon that statute as a defense, and neither a constitutional convention nor the legislature has power to divest the right, and revive the cause of action.

THIS is an action of trespass, for an alleged assault and battery and false imprisonment, instituted by the defendant in error, against the plaintiff in error, in the circuit court of Green county, on the 3th of April, 1865. The defendant filed a plea of not guilty, and at the same time two other pleas, to wit: 1st. That he was not

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guilty within one year next before the commencement of the action; and, 2d, That he was not guilty within one year next before the adoption of the schedule of the amended constitution. The defendant in error filed a demurrer to the last two pleas, which was sustained by the court, and this appeal was taken.

R. M. Barton, for plaintiff in error.

Ingersoll, for defendant.

J. T. SHIELDS, Special J. It appears, from the face of the declaration, that the alleged trespass was committed on the 11th of September, 1861, more than three years before the suit was instituted; and by our statute of limitation of actions (Code, 2772), actions for injuries to the person and false imprisonment are required to be commenced within one year from the time the cause of action accrued. But it is insisted, in argument, that, by section 4 of the schedule to the "amendment to the constitution," adopted on the 22d of February, 1865, it is expressly provided that "no statute of limitations shall be held to operate from and after May 6, 1861, until such time hereafter as the legislature may prescribe." This is true, and by the act of May 30, 1865, chapter 10, section 1, it is enacted "that no statute of limitation shall be held to operate from and after May 6, 1861, to the 1st day of January, 1867, and from the latter date the statute of limitations shall commence their operation, according to existing laws, and the time between the 6th May, 1861, and the 1st day of January, 1867, shall not be computed." And the new constitution of the state of Tennessee, ratified March 26, 1870, schedule, section 4, contains the following provision on the same subject: "The time which has elapsed from the 6th day of May, 1861, until the 1st day of January, 1867, shall not be computed in any cases affected by the statutes of limitation."

It is to be borne in mind that the alleged cause of action, in the case before us, accrued in September, 1861; that the statute of limitations, applicable to the appropriate action for the redress of the injury, was one year, so that by the law in force at the time, the action was barred, and the plaintiff in error had a vested right to plead and rely upon the protection of the statute, in September, 1862, long before the action was instituted, and long before the said amendments, the said statute and the new constitution were adopted and enacted.

We are, therefore, under the necessity of determining whether a convention or a legislature has the power, after a cause of action is clearly barred, and the party has a clear vested right to plead a statute of limitation in his defense, by a retrospective statute, ordinance or resolution, to divest the right to the defense and revive the right to maintain the action.

The principle in the government of England that the parliament is omnipotent does not prevail in the United States, though, if there be no constitutional objection to a statute, it is with us absolutely binding; but, under our written organic law, ascertaining and limiting the powers and duties of the several departments of the government, state and national, an act of the legislature may be void, as in contravention of the constitution.

The law with us must conform, in the first place, to the constitution of the United States, and then to the constitution of its particular state, and, so far as it is an infraction of either, it is void. The courts of justice have the right, and it is their imperative duty, to subject every law to the test of the constitution, first of the United States, and then of their own State, as the supreme law of the land. Every act of the legislature, contrary to the true intent and meaning of the constitution, is absolutely null and void; and the judicial department is the proper power in the government to determine the question. 1 Kent, 485, 486. This is an elementary and familiar principle in our government. Nor does a convention, convened by the people of a state, stand on any higher ground. A convention, called for the purpose of amending, revising or framing a new state constitution, has no more power to violate the national constitution than has a state legislature. "If it were so," says Judge TURLEY, "there would be no safety under our form of government in times of excitement." *Union Bank of Tennessee v. The State*, 9 Yerg. 490. The power of the judiciary to bring to the test of the constitution of the United States the action of a convention has been frequently exercised. *Cummings v. Missouri*, 4 Wall 595.

It is clear, then, that the action of the two conventions, and the act of the legislature upon the question under judgment, stands upon the same ground, and are in precisely the same category with reference to their validity under the constitution.

We proceed, then, in the exercise of our unquestionable right, and in the discharge of our most solemn and bounden judicial duty, to

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determine the question whether the two conventions and the legislature had the power, under our fundamental laws, to deprive the plaintiff in error of the defense which had accrued to him under the law of the land, as it was clearly in force at the time.

In view of the frequency with which this and analogous questions have come before the judicial tribunals of the country, and of the elaborate and exhaustive discussion which they have undergone; and holding it our solemn duty to be guided by those principles of interpretation and construction which the sages of American constitutional law have adopted and applied, and that their conclusions are to be received with the highest respect, we shall not attempt any protracted discussion, but content ourselves with stating and declaring the law as it has been handed down to us by the great founders and expounders of the constitution who have gone before us, and whose memory is revered for their purity of purpose, their love of constitutional liberty, far-seeing wisdom, and profound learning.

A statute retrospective in its character and operation, directly affecting and divesting vested rights, is very generally considered, in this country, as founded on unconstitutional principles, and consequently inoperative and void. 1 Kent, 453, citing *Osborne v. Huger*, 1 Bay, 179; *Ogden v. Blackledge*, 2 Cranch, 272; *Bedford v. Shilling*, 4 Serg. & Rawle, 401; *Society v. Wheeler*, 2 Gall. 105; *Colony v. Dublin*, 32 N. H. 432; *Torry v. Corliss*, 33 Me. 333; and numerous other authorities.

"It seems to be the general opinion," says Judge STORY (2 Com. on Con., § 1399), "fortified by a strong current of judicial opinion, that, since the American revolution, no state government can be presumed to possess the transcendental sovereignty to take away vested rights of property."

"It is to be deduced as a correct conclusion from the decided cases," says Sedgwick in his excellent work on statutory and constitutional law, "that a statute which, without some controlling public necessity, and for public objects, seeks to interfere with vested rights of private property, is beyond the true limit of legislative power." P. 177.

The power to pass such laws has been almost universally denied to exist in this country, under our written constitutions, interpreted according to their spirit and true meaning; and such is also the sentiment and opinion of the philosophical and text-writers of other countries. Puffendorf says, "a law can be repealed by the

lawgiver; but the rights which have been acquired under it while it was in force do not thereby cease." The same doctrine is to be found in Bracton (Lord Bacon, in Bacon's abridgement), and was a maxim of the civil law. It is to be found in many European codes of law; and in England, where there is no absolute restriction upon the legislative department of the government, it has been adhered to with great strictness.

The principle being well settled and established, the next inquiry is, does the case before us come within it? A statute which takes away or impairs *any vested rights* is retrospective and retroactive. *Society for Prop. of Gospel v. Wheeler*, 2 Gall. 105. And we hold, both on authority and principle, when a cause of action is barred by a statute of limitation, in force at the time the right to sue arose, and until the time of limitation expired, that the right to rely upon the statute as a defense is a vested right that cannot be disturbed by subsequent legislation.

Judge COOLEY, in his work on constitutional limitations, 369, says: "As to the circumstances under which a man may be said to have a vested right to a defense, it is somewhat difficult to lay down a comprehensive rule. He who has satisfied a demand cannot have it revived against him; and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases, the right is gone; and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation."

The power of the legislature to regulate the remedy, or to extend the time of limitation before it has completely run, are questions not involved in this case, and stand upon different principles. The question is, as to the power to extend the time, when the cause of action is already barred; and it has been uniformly held, so far as our researches have extended, that it cannot be done. In the case of *Woart v. Winnick*, 3 N. H. 473, it was expressly held that an act of the legislature repealing an act of limitation was, with respect to all actions pending at the time of the repeal, which were previously barred, null and void. This case, however, was decided under a provision in the constitution of that state. But in many other cases, in the states of Massachusetts, Michigan, Arkansas, Mississippi, Pennsylvania, Iowa, Indiana and Vermont, cited by Mr. Angel in his highly esteemed and authoritative work on limitations of actions at law, the same general doctrines seem to have been held.

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Ang. on Lim. 22, 23, note. Although our own courts seem not to have been called upon heretofore to adjudicate this precise question, yet they have uniformly held that a claim barred by a statute of limitation is deemed in law to be extinguished and discharged (9 Yerg. 543); and consequently to revive it is to interfere with a vested right. In some of the cases, and also in some of the text-writers, as in Cooley, 365, the subject-matter of the controversy and of the application of the doctrine is mentioned as property; in others, the rule is stated as being applicable to all demands that are barred. There can be no difference in principle whether it is a right to recover land or personal property *in specie*, or damages for the breach of a contract or for a *tort*. We, therefore, hold section 4 of the schedule of the amended constitution of 1865, and section 4 of the schedule of the new constitution of 1870, and the act of May 30, 1865, chap. 10, § 1, so far as by their terms and effect they authorize the institution of suits to recover on demands, whether arising *ex contractu* or *ex delicto*, that were, at the times of these several enactments and resolutions, already barred by existing laws, to be null and void.

It is further insisted that the alleged cause of action originated during a civil war, whereby the courts were closed, which continued during the whole time of the limitation, and for that reason the statute did not run. This is a question which, to our knowledge, has never received in this country any direct judicial consideration, and as to which there appears to be some conflict of opinion among the English authorities. "It seems agreed," we read in Bacon's Abridgement, vol. 6, p. 395 (Bouvier's ed.), "that there being no court, or the courts of justice being shut, is no plea to avoid the statute of limitation; as where, after the civil war, an assumpsit was brought, and the defendant pleaded the statute of limitation; to which the plaintiff replied, that a civil war had broken out; and that the government was usurped by certain traitors and rebels, which hindered the courts of justice, and by which the courts were shut up; and that, within six years after the war ended, he commenced his action; this replication was held ill, for the statute, being general, must work on all cases which are not exempted by exception." In *Guion v. Bradley Academy*, 4 Yerg. 253, and in *Cocke & Jack v. McGinnis*, M. & Y. 361, 367, in which, on other grounds, it was insisted that the statute had not run, it was held, that nothing was better settled than that the courts can

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make no other exceptions to the enacting and barring clauses of the statute, but such as are made by the legislature, for it would be legislating to do so. And such seems to have been the opinion of our legislative bodies from the times of the civil commotions and disturbances of the revolutionary war down to the present time, for, by a very old statute, to be found in 1 Scott's Laws of Tennessee, 277, a provision is made for the suspension of the statutes of limitation, during "the intrusion of a destructive war;" and it is further to be seen, by a provision in the same statute, that it was the sense of the body that enacted that statute that it had no power to revive a cause of action that was already clearly barred. During the continuance of the war other and similar laws were passed, all to be found preserved in the same venerable collection of our early statute laws.

But we do not feel ourselves called upon to decide the question at present, as it does not appear in this record that the courts were closed against the institution of process in the years 1861 and 1862, and this could not, in fact, have been made to appear, as we judicially know that such was not the fact.

(The remainder of the opinion is on questions of practice.)

Judgment reversed.

COVER, plaintiff in error, v. DAVENPORT.

(1 Heiskell, 303.)

Breach of promise to marry—contract between married man and single woman.

A contract by a married man with a single woman to marry her, if entered into by her in ignorance of his condition, is valid on her part, and she may maintain an action for a breach thereof. But if, after learning his condition, she freely, and uninfluenced by fraudulent representations, consents to the continuance of the contract, the jury may consider that fact in mitigation of damages.

THIS was an action for breach of promise to marry. Judgment was rendered for defendant below and appeal brought. We have

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omitted from the first part of the opinion a lengthy history of the case, not necessary to an understanding of the decision.

The material facts will be found in the opinion.

R. H. Barton, for plaintiff.

A. S. Marks, Maynard & Washburn, for defendant.

NICHOLSON, C. J. The most important question in the case is, whether there was error in the charge of the circuit judge to the jury, in view of the facts given in evidence. That portion of the charge on which the question is raised is as follows :

“ If the plaintiff was legally free to contract and consummate marriage, and the defendant was not, because of a then existing marriage, and the parties entered into such a contract, the plaintiff having no knowledge of the defendant's disability to consummate it, the defendant would be liable. * * * But to authorize a verdict for the plaintiff under this last stated proposition, the testimony must show the plaintiff to have acted in legal good faith — she must have been wholly ignorant of the want of legal ability on the part of the defendant at the time of the contract; and if, afterward, it came to her knowledge, and she took steps, or sought in any way, to procure or secure its execution, or gave her consent thereto, knowing its illegality, she would thereby so place herself in the wrong as to require her exclusion from the court. In such case the law would require you to find the issues in favor of the defendant.”

There are three counts in the declaration; the first two allege that plaintiff, being unmarried, at the special instance and request of defendant, promised to marry the said defendant, and the defendant then and there promised to marry the plaintiff; the first count alleging in a reasonable time, the second count omitting any allegations as to the time of marriage, etc. The third count alleges that, in consideration that the plaintiff, being sole and unmarried, at the request of the defendant, who falsely and fraudulently represented himself to be sole and unmarried, promised defendant to marry him within a reasonable time; and the plaintiff, confiding in defendant's promise and undertaking, has hitherto remained unmarried, and has always been ready to marry the defendant, until she

had notice he was a married man; and the plaintiff avers that the defendant has not married her, but, on the contrary, at the time the defendant made his promise, he was married, and still is married, to another woman."

The evidence in the cause proves that the contract of marriage was made in July, 1864, and that at the time defendant was a married man, but represented himself to be unmarried, and that the fact of his being at the time a married man was not known to plaintiff. Upon these facts the circuit judge charged the jury correctly, that plaintiff would be entitled to recover. But, he added, if afterward it came to her knowledge that he was a married man, and she took steps or sought in any way to procure or secure the execution of the contract, or gave her consent thereto, knowing its illegality, she would thereby exclude herself from court. If we rightly comprehend the language of the judge, he intended the jury to understand that, although the plaintiff would be entitled to recover if she was ignorant of defendant's being married, yet, if she did not repudiate the contract when she obtained knowledge that he was a married man, she would not be entitled to recover.

To apply this charge to the facts before the jury: It was in proof that, early in July, 1864, the contract was expressly made, though for several months the proof shows that there was an implied promise on both sides. As plaintiff did not know that defendant was married, it was a lawful contract on her part, and she was entitled to damages for its breach. But the proof further showed, that, in a short time after the making of the express contract, plaintiff was apprised of the fact that defendant was a married man; and the jury was instructed that if, upon obtaining this knowledge, she did not repudiate the contract, but was still willing to carry it out in a reasonable time, she would thereby forfeit all right to recover. Whatever may be our views, as a question of propriety and morality, as to the course plaintiff ought to have pursued when she obtained knowledge that she had made a contract of marriage with a man who was then disabled from executing the contract by reason of his being then married, we do not understand that she forfeited her right to damages, by waiting a reasonable time to see if he might not be able, lawfully, to execute his contract.

In 2 Saunders on Pleading and Evidence, 347 a declaration is set out, of which the declaration in the present cause is a copy, on

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which the plaintiff obtained a verdict. "On motion to arrest the judgment, held, that the declaration showed a sufficient consideration. *Wild v. Harris*, 13 Jur. 961; 18 L. J. 297, C. P.; held, also, that the defendant's promise was not unlawful, there being, at the time the promise was made, a possibility of performance, as the defendant's wife might have died within a reasonable time. *Id.* Held, also, that the allegations that the plaintiff remained unmarried for a reasonable time, was a sufficient consideration, as being a prejudice to her, caused by the conduct of the defendant." *Id.*

In Chitty on Contracts, 468, is laid down that "the promise of a man to marry within a reasonable time is not void, although he was married at the time of making such promise, because his wife might have died within a reasonable time."

While we cannot yield our assent to this doctrine in its full extent, we do approve the doctrine found in Addison on Contracts, 678, that, "if the party making the promise was married at the time it was made, and, consequently, incapable of entering into the contract, or of performing it, the incapacity constitutes no excuse for non-performance, unless it was known to the other contracting party at the time the promise was made and accepted."

It is clear that when plaintiff obtained knowledge that the defendant had not the capacity, by reason of his having a wife, to execute his contract, after waiting a reasonable time, she could have sued and recovered for a breach of the contract. To such an action defendant could not have made the defense that he was married when he made the promise, for the purpose of defeating the action. If defendant could have defended such an action, brought within the time for the limitation of actions on the case, by showing that after she had knowledge of his being married she consented to the continuance of the contract, or took steps to procure its consummation, such proof could only have been legitimate in mitigation of damages, but not to defeat her right of action. 2 Saund. Pl. and Ev. 348.

But to determine whether the plaintiff forfeited her right to recover full damages by an unreasonable delay in suing, or by any conduct beyond the simple delay, it is necessary to look to the facts as they existed at the time she learned that defendant was a married man, and to the circumstances which controlled her in delaying her action. It will have been seen by the history of the case, as we have given it, that it was not until the plaintiff had expressly

accepted his proposal of marriage that he communicated to her the fact that he was not then free to marry her. He withheld this fact from her until, by his persistent appliances, he had secured her affections and her confidence. He had told her that he had been married, but he had also assured her that he was then free to marry again. But after he became satisfied that he was secure in having won her love and her confidence, he disclosed to her the fact that he was not then free to marry her, as he had before thought, and as he had told her he was, but that he was not free from his wife, simply because, from oversight or negligence, the papers for their separation, which had been prepared and agreed on, had not been executed. He assured her, in substance, that this was a mere matter of form; that he would have no trouble in arranging it. She confided in and believed him. It is possible that he was honest in these assurances, but, whether he was acting honestly or fraudulently, she believed his statements, and doubted not, that, within a short time, the slight obstacle in the way of the marriage would be removed. In her situation it was not probable that she would suspect the fraudulent device to which he was resorting to continue the dominion which he knew he had acquired over her. From the moment she yielded to him her heart, and agreed to become his wife, she became an easy victim of his misrepresentations. When he wrote to her that he would soon be free to marry her she believed him, because she loved him, because she was already *in vinculis*.

To hold that she lost her right to full damages by delaying to sue under such circumstances would be to hold that defendant could avail himself of his fraud in procuring her to delay in order to relieve himself of his liability for damages for the original fraud in procuring from her a promise of marriage. So far from being relieved from the liability growing out of his original fraud, by exerting his power over her to induce her not to repudiate the contract on her part, he estopped himself from relying on such a defense, if she delayed at his urgent request, or if she did so in consequence of his false and fraudulent representations. His conduct, if fraudulent, in procuring her to continue her promise after she knew that he was married would be an aggravation of his fraud in imposing upon her ignorance in the first instance.

By reference to the history of his conduct from July, 1864, to the close of the next year, it is in proof that, day after day, week after week, and month after month, he continued his efforts, by urgent and

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passionate appeals, and by a succession of false promises, operating upon her hopes, to still further influence her passions, and to induce her not to repudiate her engagement. This artful and effective scheme of influencing the plaintiff, situated as she was, seems to have been successfully practiced down to his last letter in November, 1865, in which he still repeated his assurances of an early consummation of their hopes, and his urgent request that she should adhere to her promise. During all this time, her passionate devotion to him, while it blinded her to his fraudulent devices, subjected her to his constant and continuing influence. Under such circumstances, it was error in the circuit judge to tell the jury that plaintiff must be excluded from court if she failed to repudiate the contract, upon learning that defendant was a married man. The jury ought to have been left to determine the fact whether she was not induced to continue to assent to and recognize the contract by the influence exerted over her by the defendant.

They ought to have been told that if, after she learned he was a married man, she freely and understandingly, and uninfluenced by fraudulent misrepresentations, consented to the continuance of the contract, or took steps to secure its consummation, they might look to such facts in mitigation of damages, but that such proof would not defeat her right of action. In charging that such proof would exclude her from court, and defeat her right to recover, there was clear error.

The remainder of the opinion relates to questions of practice.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

STATE *ex rel.* OLIVER *et al.* v. WARMOTH *et al.*, appellants.

(23 La. An. 1.)

Limit of judicial power — Mandamus.

In organization of the federal and state governments, three separate bodies of magistracy were established, the legislative, executive and judicial. It was intended that the functions of each of these should be separate and distinct within its own sphere, and, as far as practicable, independent of those of the other branches. Neither branch is permitted to exercise the powers appropriately belonging to another.

The doctrine that there is a distinction between a purely ministerial act and one in the discretion of the executive, and that the performance of the former by the executive may be enforced by judicial order, accords to the judiciary the large discretion of determining the character of all acts which would infringe the right of the executive to use discretion in determining the same question.

Therefore a writ of mandamus will not issue to compel the chief executive to perform an act required by law to be done by him.

APPEAL from the sixth district court of New Orleans. The facts appear in the opinion.

T. A. Bartlette, for relator.

S. Belden, attorney-general, and *Henry C. Dibble*, for defendants.

TALIAFERRO, J. This appeal is taken by the defendants and the intervenor from a judgment of the lower court, dismissing the inter-

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vention and rendering peremptory a mandamus issued upon the application of the relators against the governor of the state to compel him to execute and deliver to them forty-eight state bonds, which, they allege, they are entitled to receive in payment of certain public work authorized to be done by the act of the legislature, approved 8th of September, 1868, entitled "An act to provide for the improvement of the navigation of Red river." The state intervened, alleging that the act of the legislature authorizing the issue of the bonds which the relators seek to obtain is unconstitutional and void, on the ground that it is not in conformity with article one hundred and eleven of the state constitution. On the part of the defendants it is contended that the court is without jurisdiction of the subject-matter; that it is not invested with power to compel by mandamus the chief executive officer of the state to perform acts within the sphere of his department. The defendants also allege the unconstitutionality of the act of the legislature, under which the relators demand the bonds. That act authorized improvements to be made in the navigation of a portion of Red river above Shreveport, and provided for a survey and letting out of the work, and for payment for it, by state bonds to be delivered to the contractors upon completion of the work, and the presentation of the certificate of the commissioners appointed on the part of the state that the work has been completed according to the contract. Section five provides that "the governor of the state shall cause to be prepared and printed the number of bonds necessary for delivery to the contractor," etc., "and which said bonds shall be signed by the governor and countersigned by the auditor and treasurer, and delivered to the auditor and issued by him to the contractors," etc.

The intervention, we think, was properly dismissed; the question of the constitutionality of the act cannot be inquired into in this proceeding. The only inquiry is, as to the power or authority of the court to order by writ of mandamus the performance by the governor of the acts required by the law to be done by him; and this requires us to refer briefly to the three divisions of power established in the foundation of the federal and state governments. In the organization of the United States government its framers adopted, as a principle, that, in order to its stability and faithful administration, the powers of the government should be distributed between different orders of functionaries, watching and balancing each other. Three separate bodies of magistracy were therefore established — the legis-

lative, the executive and the judicial. It was intended that the functions of these coördinate branches of the government should be conjointly exercised, but that the functions of each should be separately and distinctly exercised within its own sphere, and, as far as practicable, independently of those of the other branches. Neither branch is permitted to exercise the powers appropriately belonging to another. An extreme jealousy of the least encroachment by one of the departments upon the powers of another has constantly existed ever since the adoption of the constitution of 1787; and very much of the political agitation that has arisen in this country had for its cause the alleged usurpation, by some one of the branches, of the powers and functions of another. The subject must always, from its nature, be a delicate one, and we accordingly find that, when cases involving questions relating to such interference have been presented to the judiciary, either federal or state, the courts have always proceeded with hesitancy and caution. Direct decisions on questions of this character are not numerous, and those determined by the state courts are not entirely in harmony with each other. Of the cases which have been presented to our consideration by counsel, a decided majority ignore the power of the judiciary to order, by process of mandamus, the performance of an act required by law to be done by the chief executive officer of the state. A difficulty of no inconsiderable magnitude, we apprehend, arises from the attempt to establish that a distinction is to be taken between an act purely and simply ministerial, and one in which a discretion to perform it or not remains with the executive, and thence to conclude that the performance of the mere ministerial act by the executive may be enforced by the judicial order of a court. We think this doctrine objectionable in this, that it accords to the judiciary the large discretion of determining the character of all acts to be performed by the chief executive officer, as being merely ministerial or otherwise. This would infringe the right of the executive to use discretion in determining the same question. He must be presumed to have this discretion, and the right of deciding what acts his duties require him to perform; otherwise his functions would be trammelled, and the executive branch of the government made subservient, in an important feature, to the judiciary.

The celebrated case of *Marbury v. Madison*, 1 Cranch, 137, is one usually referred to in discussing questions of the kind under consideration, and different deductions have been drawn from it, so as

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to present authority on both sides of the question. The facts of the case are, that shortly before the retirement of the elder Adams from the presidency, Marbury was appointed to the office of justice of the peace for the District of Columbia. His commission was made out, signed by the president, and the great seal of the United States attached. It was, however, not delivered before the expiration of Mr. Adams' term of office; and, upon the incoming of the next administration, Mr. Jefferson instructed Mr. Madison, then secretary of state, not to deliver the commission. Thereupon Marbury applied to the supreme court of the United States for a writ of mandamus ordering the secretary to deliver the commission. The court decided that it had not original jurisdiction of the case, and dismissed the application, but intimated very clearly that the writ might be issued by a competent court. But this case affords no satisfactory guide in deciding the one at bar. From the scope of the reasoning in the Marbury case, and in its entirety, we find nothing clearly announcing that a mandamus could properly be directed to the president of the United States ordering him to perform any act within the range of his official duties. In that case the court seems to have assumed that, over the matter involved, the president had no further control; that it had passed beyond his jurisdiction or cognizance; that all the action he was required to take in it had been taken; that he had no further interest or concern about it; that it was not incumbent upon him to deliver the justice's commission, and that he had not been required to deliver it; that the commission lay in the secretary of state's office to be given to the appointee when he applied for it; that the act to be done was simply the manual delivery of the document by the secretary, or one of his clerks, to Mr. Marbury, and that, under this state of facts, the mandamus, had one been directed to the secretary to perform the act, would have been no encroachment upon the rights of the executive. A right in the judiciary to interfere with or encroach upon the rights or functions of the executive is distinctly and *ex industria* disavowed. Nevertheless, it is a matter of history that Mr. Jefferson, one of the founders of the government, and well versed in the knowledge of its character, eminent as a statesman and politician, and respectable as a jurist, never conceded the correctness of the views taken of that subject by the very learned and able chief justice, and ever held that the doctrine enunciated in the *obiter dictum* of Judge MARSHALL sanctioned an

encroachment upon the powers of the executive department which is incompatible with their independent exercise.

When the official acts to be performed by the executive branch of the government are divided into ministerial and political, and courts assume the right to enforce the performance of the former, it opens a wide margin for the exercise of judicial power. The judge may say what acts are ministerial and what political. Circumstances may arise and conditions may exist which would require the governor of a state in the proper exercise of his duty, and with regard to the interests of the state, *not* to perform a ministerial act. Is the judge to determine his duty in such a case, and compel him to perform it? The reasons of the executive for the non-performance of an act the judge may never know, or, if brought to his knowledge, he may review and overrule them, and, in so doing, assume political functions. He would determine in such a case the policy of doing the act. The legislator himself who prescribed the act might hold the executive harmless while the judge condemned him. In cases where the question of the right of state courts to issue writs of mandamus, compelling the chief executive officer of the state to perform acts appertaining to his functions, we find that decisions adverse to the existence of such right have been rendered by courts of the last resort in Maine, New Jersey, Illinois, Missouri, Arkansas, Georgia and Texas, to which may also be added a very recent case decided in Rhode Island. In Ohio and North Carolina a different view has been taken. It was held in these states, that a mandamus might issue against the governor of a state, to compel the performance of mere ministerial acts. Of the decisions of this question in our sister states, those determining against the rights of the judiciary to interpose its authority in matters relating to the duties and functions of the executive department, we regard as greatly preponderating in number and weight of authority.

A case decided in Illinois, in 1857 (*The People ex rel. v. Bissell*, 19 Ill. 230), is identical with the one before us. An application was filed by the relator, asking for a writ of mandamus commanding the governor of Illinois to issue to the relator certain interest bonds or certificates to which he claimed to be entitled. In that case the supreme court of Illinois said: "We have no power to compel either of the other departments of the government to perform any duty which the constitution or the law may impose upon them, no matter how palpable such duty may be, any more than either of those

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departments may compel us to perform our duties. The governor is and must be as independent of us as is the legislature, or as we are of either of them. So far as the question of power or jurisdiction is concerned, there can be no difference whether the act or omission may affect one or many; whether it may be prejudicial to the rights of an individual, or the whole community. What difference whether the executive act required by law be to order an election, or appoint an officer, or issue a bond? Upon the governor alone must the responsibility rest of acting or refusing to act."

A member of the court concurring, adds: "The executive has certain duties imposed upon him by the constitution and the laws of the state. Should he fail to perform them, without justifiable reasons therefor, and the public be injured, impeachment and deprivation of office would follow. This court has no control over him to compel him to perform any public duty. In his sphere he is independent of the court. Should he consent to appear, asking our opinion on a point of duty, it would be readily given. We cannot compel him to appear, and no order we might issue for such purpose could be available, should he resist. In matters of public duty, we remit him to the high tribunal of his own conscience and the public judgment."

A supervisory control by one of the coördinate branches of the government over the functions and duties of another branch would necessarily diminish the responsibility of the branch whose functions were encroached upon. The more distinct and independent the action of public functionaries, the stronger and more direct their responsibility. This ground of responsibility was, doubtless, one of the purposes aimed at by the framers of the government, in the separation of powers. Constitutional provisions were wisely made for the punishment of officials, however exalted, for dereliction of duty. But, at the same time, something was necessarily to be intrusted to the intelligence and probity of the officer who, from a consciousness of the trust and confidence reposed in him, would be thereby induced to discharge his duties honestly, from a sense of honor and propriety.

We are satisfied, from the views we have taken of this subject, that there is error in the order of the court below rendering the mandamus peremptory. It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided

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and reversed. It is further ordered that the writ of mandamus be set aside and discharged, the relators paying costs in both courts.

Rehearing refused.

D'ARMOND v. DUBOSE, appellant.

(23 La. An. 131.)

Evidence—Uncanceled revenue stamp.

The failure to properly cancel United States revenue stamps affixed to an instrument does not render it invalid or incapable of being introduced in evidence.

APPEAL from fifth district court, parish of East Feliciana.

Cross & Hardee, and Race, Foster & E. T. Merrick, for plaintiff.

Kernan & Lyons, for defendant.

HOWE, J. The defendant, appellant, contends that the court *a qua* erred in receiving in evidence the note sued upon, because, having upon it the amount of stamps required by the laws of the United States, those stamps were not properly canceled.

We are of opinion that the court did not err. The internal revenue laws of the United States provided a special method of cancellation and a penalty for its non-observance; but we are not advised that they anywhere provide that instruments on which the proper stamps have been affixed, but not properly canceled, shall be invalid, or incapable of being introduced in evidence.

It is therefore ordered that the judgment appealed from be affirmed, with costs.

Kember v. Southern Express Company.

KEMBER *et al.* v. SOUTHERN EXPRESS COMPANY, appellant.

(23 La. An. 153.)

Common carrier — Stipulation limiting liability of — When not binding.

The defendants received from plaintiff's agent a package of gold for transportation. The defendants' clerk in charge of the office was informed, at the time, of the contents of the package, and directed to collect for its carriage from the person receiving it. The package was lost while being transported. *Held*, that the defendants were liable for the full value of the package, and that the fact that the plaintiffs' agent accepted a receipt in which it was set forth that the package was an ordinary one, and that the liability of the company therefor, in case of loss, should not exceed \$50, did not operate to so limit its liability.

APPEAL from fourth district court of New Orleans.

Early in January, 1866, the plaintiffs, being in Mobile, instructed their agent in New Orleans to purchase and forward them \$4,000 in gold. The agent obtained the gold, and placed the same in the hands of the defendants' clerk in charge of its office at New Orleans for transportation to Mobile. According to the testimony of the agent, the gold was placed in an oil canvas, then enveloped in stiff brown paper, tied and sealed with wax, with the impression "G. C." on the wax in three or more different places. A small piece of white writing paper, containing the name and place of business of the sender and the address of the plaintiff was pasted upon the package. At the time of delivery, the agent said to the clerk who received it: "This is gold" — at the same time placing it upon the counter. He was asked by the clerk who was sending it, and stated that *he* was, giving his name and address, whereupon the clerk made an entry in a book, and then placed the package on a shelf by itself in the rear of the counter. No agreement was made with regard to the amount to be paid for the transportation of the package, but the clerk was told that the charges would be paid at Mobile, which he acquiesced in.

The way-bill of the express company for February 1, 1866, has an entry "Coppell, Kember & George, Mobile, freight 50."

By the testimony of one of defendants' employees, it appears that the agent, at the time of delivering the package, accepted a receipt therefor, in which the package was described as an ordinary one, and

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containing a clause limiting the amount of the company's liability for loss to fifty dollars. The agent testified, however, that he did not notice the limitation until his attention was called to it after he had become acquainted with the loss of the gold.

G. M. Cornell & Son, for plaintiffs.

H. G. Lovey and E. C. Billings for defendants.

TALIAFERRO, J. (after commenting on and setting forth at some length the facts and evidence). We think it clearly established that the company received the package of gold with full knowledge of its contents. The statement by one of the defendants' witnesses that Coppell told him, after the loss of the package, that when he delivered it for transmission, and informed the clerk of its contents, the latter did not hear him, being at the time engaged in conversation with another clerk, appears to be intrinsically entitled to little weight. It seems improbable that a man of ordinary prudence and business capacity would deposit in the office of an express company a package containing four thousand dollars in gold, tell a clerk who did not hear him that it contained gold, and use no further effort to make himself understood as to what the commodity was that he desired to transmit. Certainly such evidence cannot avail the company against the clear, distinct and positive statement of the agent, that the clerk to whom he delivered the package inquired, upon being informed of its contents, in whose name it was to be shipped, made an entry in a book, received the package, and laid it away on a shelf in the rear of the counter, separately and apart to itself, there being upon the shelf no other package or other articles. In addition to this, the careful manner in which the package was made up and secured by fastenings, sealed with wax, having impressed upon it the initials of the consignor, and, upon a white slip of paper attached, the names and residence of the consignees, and also the great weight of a package of so small a bulk, were all indications which could not be disregarded that its contents were of greater value than ordinary small packages of goods. No attempt is made by the defendants to account for the loss of the gold which they received for transportation. They rely upon the receipt, which does not show that the package was received as being of greater value

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than would, in the event of its loss, render the company liable for more than fifty dollars.

Under the circumstances, and the state of facts presented in this case, we think the plaintiffs should recover. They fulfilled the most important condition set forth in the receipt, that of making known the value of the thing to be shipped. This act necessarily preceded the making out and delivery of the receipt. Knowing the value of the package received for transmission, good faith and fair dealing required that the defendants should have specified its value in their receipt which they delivered to the plaintiff's agent, who received it from the company's clerk. The latter had every reason to believe that the former took it as an acknowledgment of the possession of the gold, and an agreement to carry it to Mobile. The facts more strongly warrant this conclusion than, as intimated in argument, that the agent was acting disingenuously by aiming to get the transportation for a very trifling sum, thinking, at the same time, the company would be responsible if the gold were lost.

For these reasons we think the decision of the lower court ought to be adhered to.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs in both courts.

Rehearing refused.

 SUCCESSION OF JESSE W. WILDER.

(23 La. An. 219.)

Conflict of laws — Ante-nuptial contract by minor.

An ante-nuptial contract was made in the state of Mississippi by a female minor with her intended husband. The contract was to be carried out in the state of Louisiana, where the husband and wife resided after marriage. *Held*, that the capacity of the parties, as well as the form of the contract, must be governed by the laws of Mississippi, while its effect must be governed by those of Louisiana.

To ascertain whether such a contract is for the benefit of the minor, so as to determine whether it is void or voidable, the *lex loci contractus* alone must be considered.

Under the common law, as administered in the United States, the general rule is, that the contracts of minors are voidable only, and not void. The

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exception is, where the contract on its face appears necessarily prejudicial to the minor.

Where nothing appears on the face of a marriage contract necessarily prejudicial to the minor wife, it is voidable only, and, if not disaffirmed by her when she has the capacity so to do, will be binding on her.

APPEAL from the second district court of New Orleans.

George Wilder instituted this suit against Mrs. Jordan, his step-mother, and her two children (his co-heirs), for partition of the property of the succession of his father, Jesse W. Wilder.

In November, 1854, Jesse W. Wilder, of New Orleans, married Harriet A. Bartholomew, of the county of Hancock and state of Mississippi, at the residence of her father, in said county and state, and in a few days thereafter removed to New Orleans, where they continued to reside until the death of Wilder, in January, 1862. On the day and at the place of the marriage, and just before its celebration, the ante-nuptial agreement, or marriage contract in question, was executed. The plaintiff, George Wilder, the issue of a former marriage, was then a minor. A witness, who was present at the marriage, describes Jesse W. Wilder as old and infirm, and his bride as a charming girl of about seventeen.

The marriage contract declares: "That whereas, a marriage is intended presently to be solemnized between said Jesse and Harriet, and they are desirous, prior to that event, to settle their respective estates according to purposes, uses and limitations intended and desired, so that the right, title and interests may be defined, and not to be affected by the contemplated union; and whereas, the said Wilder is engaged in business in the city of New Orleans, with a capital of \$5,000, or more or less, which (as well as any other property in which said capital, and the profits accruing therefrom, may be now or hereafter invested) he desires to keep free from and unaffected by any claim, right, restraint or contingency arising out of his marriage with said Harriet; and whereas, said Harriet A. Bartholomew is the owner of a slave woman named Lucinda, conveyed to her by notarial act of record in the office of E. L. Lewis, notary public, in the city of New Orleans, which said slave and her issue, together with any other estate, real or personal, to which she is now entitled or which she may hereafter acquire or receive by gift, devise or inheritance, she desires to render subservient to her own comfort and control during the contemplated coverture,

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with the power of alienation, devise or bequest beyond the interference or restraint of her intended husband. Now, therefore, said Harriet relinquishes and abandons all right, title, claim or interest whatever which she might otherwise have acquired in the real and personal property of said Jesse W. Wilder, and he renounces all right, title or claim of, in or to the property, real or personal, of said Harriet, leaving her free to sell, incumber, devise or bequeath the same, or any part of it, according to her own pleasure, as though she was *feme sole*. And said Lewis Bartholomew is charged to make under her order any and all proper conveyances, assurances, etc. Said Jesse W. Wilder and Harriet A. Bartholomew, respectively, do hereby reserve and retain the entire and absolute control in and over their respective estates and property as now owned by each, *and which may be acquired during their coverture*, with the right and power to each from and after the contemplated marriage, and at any and all times during the coverture, by deed, will or otherwise, to dispose of the same, or any portion thereof, according to their own will and pleasure, respectively, without the interference, consent or claim of the other." * * *

Buchanan & Gilmore, for George Wilder, appellant.

Race, Foster & E. T. Merrick, for Mrs. Jordan, appellee.

Frank Haynes, for under tutor.

WYLY, J. The district judge came to the conclusion that the terms of the marriage settlement did not preclude the existence of community between the spouses, and rendered judgment for the defendant, Mrs. Jordan, and the plaintiff has appealed. We cannot agree with the learned judge on the ground on which he based his decision. We think a fair interpretation of the ante-nuptial agreement leaves no room to doubt the exclusion of community. If full effect be given to the stipulations of the marriage contract, no community can exist. It would be impossible; because, under that instrument, each spouse retains "absolute control in and over their respective estates and property as now owned by each, and *which may be acquired during their coverture*," with the right of disposition reserved to each, to be exercised at any and all times during coverture without the consent or interference of the other.

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We have found more difficulty, however, in the other grounds taken by the learned counsel of the defendant, Mrs. Jordan; but, after a full examination of the authorities bearing on the case and the evidence contained in the record, have come to a conclusion adverse to him. The contract was made in Mississippi, where the bride, Miss Bartholomew, then within the age of minority, resided; it was, doubtless, intended to have effect at the domicile and place of business of the husband, in this state. The capacity of the parties, as well as the form of the contract, must be tested by the laws of Mississippi, while its effect must be governed by the laws of this state.

The question is as to the capacity of Harriet A. Bartholomew to make the contract. Was it voidable on account of her minority, or was it absolutely void?

Tested by the rule stated by the counsel himself, to wit: Where the contract is not to the advantage of the minor, it is absolutely void, we do not think the marriage contract in question is void. Suppose the parties had settled in Mississippi, making that their business and matrimonial domicile, and that Jesse W. Wilder had died there, and his succession had been opened, and the issues now raised were presented to a Mississippi tribunal for adjudication, could it be said that a court of that state would decree the marriage contract under consideration void, where the succession was under its jurisdiction, and where it could apply the common law prevailing there, as well to the effect as to the form of the contract and the capacity of the parties?

With the matrimonial domicile in that state, where the common law is administered, can it be said that the wife did not derive any greater rights over her property, the slave, during marriage, with the ante-nuptial contract, than she would have had without it? Surely not. By the common law, the wife has not the right to administer her paraphernal property as she can under the civil law. We deem it proper to remark that the statutes of Mississippi were not introduced in evidence, and we assume, as a matter of history, that the common law prevails there.

The error, we think, the learned counsel of the defendant has made is, that when examining the validity of the act as affected by minority, according to the laws of Mississippi, he looks to the effect of the contract, not as tested by the same laws, but as tested by the laws of this state, which allow the community of acquets and gains,

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and which permit the wife to resume at pleasure the administration of her paraphernal property.

When the effect of the contract is looked to merely to ascertain whether it is valid and binding on the minor who made it, the laws of the state regulating the validity of the contract must alone be consulted. To ascertain whether the contract was for the advantage of the minor, in order to see whether it is void or voidable, the *lex loci contractus* alone must be considered.

The laws of this state, which was the domicil, and the laws of the place of contract, Mississippi, cannot both be applied to ascertain the validity of the instrument. We cannot say that the contract is not valid in Mississippi, because it gives nothing more to the minor wife than she would have without it under the laws of Louisiana.

The opinions of the witnesses Goode and Dillingham, experienced lawyers of Mississippi, were received as evidence in the case; they are positively of the opinion that the marriage contract under discussion was not void, but only voidable, by the laws of Mississippi, where it was made. Their opinions are entitled to great weight in determining the case, because they were received by the parties as evidence. We think, however, the authorities bearing on the case do not sustain the rule, that where a contract is not for the advantage of the minor it is absolutely void, and not voidable, as announced by the counsel of the defendant to be the test to ascertain the validity of the ante-nuptial contract under consideration.

It appears to us that the weight of authorities and the decisions of the courts of the states of the Union where the common law is administered, establish a different rule from that stated by the learned counsel of the defendant, to which we have adverted. We take it to be the general rule that the acts and contracts of minors, under the common law as administered in the United States, are voidable only, and not void; and the exception is, where the contract on its face appears necessarily prejudicial to the minor.

We discover nothing on the face of the marriage contract necessarily prejudicial to the minor, and we regard it as merely voidable.

The question before us was elaborately examined by the supreme court of the United States, in *Tucker et al. v. Moreland*, 10 Pet. 65; after a thorough review of the English authorities, Mr. Justice STORY, the organ of the court, arrived at this conclusion. He says: "It is apparent, then, upon English authorities, that however true-

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it may be that an infant may so far bind himself by deed in certain cases as that, in consequence of the solemnity of the instrument it is voidable only, and not void; yet that the instrument, however solemn, is held to be void, if, upon its face, it is apparent that it is to the prejudice of the infant." The same eminent jurist, after carefully reviewing the American decisions on this question, declares that: "The result of the American decisions has been correctly stated by Mr. Chancellor KENT (2 Com., § 31) to be, that they are in favor of construing the acts and contracts of infants generally to be voidable only, and not void, and subject to their election, when they come of age, either to affirm or disallow them; and that the doctrine of *Zouch v. Parsons* has been recognized and adopted as law. It may be added that they seem generally to hold that the deed of an infant conveying lands is voidable only, and not void, unless, perhaps, the deed should manifestly appear on the face of it to be to the prejudice of the infant; and this, upon the nature and solemnity, as well as the operation of the instrument." 10 Pet. 71.

Considering the solemnity of the act before us, and the main object of the parties to contract a marriage, to define their rights of property, and to stipulate for the regulation of the same during the contemplated coverture, we can see nothing prejudicial to the interest of the minor; and, tested by the laws applicable, we believe the contract in question was only voidable, and that it was binding on the minor, unless disaffirmed by her afterward, when having the capacity to do so. We find in the record no evidence of the disaffirmance thereof by Mrs. Jordan, although many years have elapsed since she has arrived of age, and has had the capacity to do so. It is now too late for her to demand the rescission of the contract, as the prescription pleaded by the plaintiff is applicable thereto. C. C. 3507. The other questions are not of a serious character.

It is, therefore, ordered, that the judgment of the court *a qua* be avoided and annulled, and that there be judgment forbidding Mrs. Jordan to participate as partner in community in the succession of Jesse W. Wilder, and that this case be remanded to the court *a qua* for decision of the other issues herein, and to be proceeded in according to law, and that the defendant, Mrs. Jordan, pay costs of this appeal.

Maspero v. Pedesclaux.

MASPERO, appellant, v. PEDESCLAUX, administrator.

(22 La. An. 227.)

Promissory notes — Notice addressed to deceased indorser.

Where, a short time previous to the maturity of a note, an indorser dies, a proper notice of protest of the note sent to such indorser's address, the holder and notary being ignorant of his death, and actually reaching the administrator and one of the heirs, will be sufficient to bind the estate.

APPEAL from fourth district, parish of Ascension. The facts appear in the opinion.

S. M. Berault and Emile Legendre, for plaintiff.

J. K. Gaudet and John H. Ilsley, for defendant.

LUDELING, C. J. On the 8th day of March, 1863, J. A. Landry made a note for \$5,000 to the order of Mrs. A. Pedesclaux, payable twelve months after date, at the counting-house of P. Maspero, New Orleans. This note was indorsed in blank by the payee. At its maturity the note was duly protested, and notice of protest was sent through the post-office, addressed to the indorser at Donaldsonville. The indorser had died previously to the maturity of the note, but there is nothing to show that this fact was known to the holder or notary.

It seems to be conceded that the notice of protest would have been good if the indorser had been living when it was made. Is it not valid, notwithstanding the death of the indorser?

The evidence shows that the notice of protest was duly received at the Donaldsonville post-office, where the indorser was in the habit of receiving her letters during her life. Ernest Pedesclaux, the administrator, says: "The letters in the post-office, when addressed to my deceased mother, when withdrawn, were opened by my sisters and myself. They were generally withdrawn from the office. Witness recollects receiving a notice of the protest of the note sued on. My sisters were equally heirs of the deceased. Witness received the protest before he was appointed administrator of his mother's succession."

The heirs had not accepted the succession, nor had any administrator been appointed to represent the succession, at the time the

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protest was made and notice thereof sent. Even if the holder were bound to know that the indorser was dead, under these circumstances we are not prepared to say the notice was bad. Story on Promissory Notes, § 310; Parsons on Notes and Bills, 500, 501; *Stewart v. Eden*, 2 Caine, 121; 17 Johns. 25; Parsons on Mercantile Law, 117.

But in this case the notice actually reached the administrator of the succession, and one of the heirs; and the evidence makes it quite probable that it reached *all the heirs* in due time. Thus the purpose of the law was attained. *Louisiana State Bank v. Dumastrait et al.*, 4 An. 483.

It is, therefore, ordered that the judgment of the district court be reversed, and that there be judgment against the defendant for the sum of \$5,000, with five per cent per annum interest thereon from the eleventh day of March, 1864, till paid, and costs of both courts, to be paid in due course of administration.

CORMIER V. BIENVENU, appellant.

(22 La. An. 300.)

Slavery — contracts relating to.

By the abolition of slavery all contracts existing at the time relating to the sale of slaves were annulled. The sale of a slave being only the sale of his services for life, there was no difference between the right of an owner and of a hirer except in duration; obligations for the sale and also for the hire of slaves were canceled by such abolition, and it is of no importance that the period of hire had terminated before the extinction of slavery or that the contract was valid prior to that time.

APPEAL from third judicial district, parish of St. Martin.

The action was to recover the amount of a promissory note executed by the defendant on the 1st of March, 1864, for \$308, and interest at eight per cent per annum.

The defendant alleged in a supplemental answer, and it was not denied, that the consideration of the note was for the value of the services of slaves hired by plaintiff to defendant.

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Garry & Fournet, for plaintiff.*De Blanc & Perry*, for defendant.

TALIAFERRO, J. The ownership of persons, as it formerly existed in this country, cannot be said to have extended beyond the right of the owner to exact, for his own use and benefit, the labor and services of the person subjected to that ownership without remuneration to him. The person hiring a slave had this right during the term of the lease to the same extent that the owner had. Both the owner and the hirer were entitled, by the laws that then existed, to exact from the slave his labor, without recompense to him. The hirer had, however, to account for the hire of the services to the owner of the slave. Then, the difference between the right of the owner and that of the hirer consisted only in the duration of the right, and in the obligation of the hirer to pay the owner of the slave for his labor and services. In the one case, the labor and services were to continue an indefinite period of time—that is, during the life of the slave. In the other case, a fixed term was established. By the abolition of slavery, all contracts existing at the time, relating to the sale of slaves, were annulled. The sale of a slave being, in substance, the sale of his services for life, the obligation, which was previously binding upon the purchaser, to pay for these services received, and to be received, became extinct. In like manner the obligation of the hirer to pay for the services of the slave for a fixed period was canceled.

It is of no importance whether the period of the hire of the slave had terminated or not before the time of the extinction of slavery, nor whether the contract was valid prior to that time. With the end of the status or condition of slavery, every contract founded upon or growing out of that condition necessarily came to an end, also, whether such contract was previously valid or not. As well might it be decreed that the purchaser of a slave who had never paid any part of the stipulated price, and who had received the services of the slave for years before emancipation, should pay for these services, as to decree that the hirer of a slave should pay the stipulated hire, which became due before that event occurred. True, in the one case there was a special contract for hire; in the other there was not. But the analogy of the two cases is so strong, that whatever equity would require in the one case, it would equally

require in the other. The existence of a state of slavery, sanctioned by law, lay at the foundation of the contract of hire of slaves. The laws which authorized and enforced the contract were necessarily abolished by the subversion of slavery. Persons could no longer be sold or hired. Existing obligations for the price or the hire could not be enforced, for there was no longer any law authorizing their enforcement.

It will not do to say that these existing obligations were not impaired by the act of emancipation, and could not be. The high behest of the sovereign power is uncontrolled by prohibitions which restrain ordinary legislation. Its force destroyed all the objections depending for their efficacy upon the existence of laws maintaining slavery. Courts were therefore left without authority to enforce contracts of this character.

The case of *Dickinson v. Maynard*, 20 An. 66, in which this court awarded a small sum to the plaintiff, constructively as hire of a slave, was not a suit for hire of slaves, but for damages on account of an attachment wrongfully sued out by the defendant. The award was virtually in the nature of damages, and made on the authority of *Phelps v. Coggeshill*, 13 An. 440. In this, as well as in another important feature, that case differs widely from the one before us.

In the case of *Tate, adm'r, v. Fletcher et al.*, 19 An. 371, the judgment of the district court was reversed, as to that part of it which allowed the plaintiff hire for a slave, and the decision was based upon the doctrine of the case of *Wainwright v. Bridges*, 19 An. 234, then recently decided. This we consider as the settled doctrine in regard to the question of the right to recover the hire of slaves.

It is therefore ordered, adjudged and decreed that the judgment of the district court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant, the plaintiff and appellee paying costs in both courts.

Young v. Ship Princess Royal.

YOUNG V. SHIP PRINCESS ROYAL *et al.*

(23 La. An. 388.)

Jurisdiction in maritime claims..

A proceeding *in rem* against a vessel for the recovery of damages for a maritime tort can be enforced only by the courts of the United States.

APPEAL from fourth district court, parish of Orleans. The facts appear in the opinion.

Randolph, Singleton & Browne, for plaintiff.

Race, Foster & E. T. Merrick, for defendant.

Hornor & Benedict, for warrantors.

LUDELING, C. J. The plaintiff complains that, by a collision in the port of New Orleans, his flat boat and a cargo of flour were damaged by the fault of those in charge of the ship Princess Royal, to the extent of \$1,332.18. He alleges that he has a privilege on the ship to secure the payment of the damages; that her owners are non-residents and unknown to plaintiff; and he prays for an attachment against the vessel and for judgment against the master and owners for the sum above stated, with interest and costs, and with privilege on the ship Princess Royal, her tackle, etc. The usual affidavit and bond for attachment were made, and a writ of attachment issued.

The defendants appeared, and for answer filed a general denial; they called the master and owners of the tug-boat Tuscarora in warranty, alleging that they had the ship Princess Royal in tow, and that they were responsible for any damages done to the plaintiff, etc. They alleged that the master and owners of the Tuscarora are non-residents; they allege that under the law of the state they have a privilege on the ship, and pray for an attachment, etc.

The warrantors excepted, on the grounds following: That the court "was without jurisdiction over the matter and things involved in" the suit; that no law authorized the call in warranty; that no cause of action is stated against the warrantors.

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Subsequently they filed a rule to quash the attachment for the reasons following: That the court is without jurisdiction; that no law of the state accords to the defendant a right to a writ of attachment; that the affidavit is insufficient; that the damages claimed are not due, and that the bond is not good. The exceptions and rule were dismissed, and the warrantors filed for their answer a general denial.

Later in these proceedings the defendants and warrantors filed an exception to the jurisdiction of the court, on the ground that the case was within the exclusive admiralty and maritime jurisdiction of the United States courts.

This exception was sustained, and the suit was dismissed, and the plaintiff has appealed.

If this action be considered as a proceeding *in rem* for the enforcement of a privilege given by law (R. S. 1855, p. 538, § 9) on the vessel, for the recovery of damages for a tort, the state courts are without jurisdiction. The case would be one of maritime tort, creating an admiralty lien, which can be enforced against the ship only by the courts of the United States. 4 Wall. 424, 561.

If the suit be regarded as an attachment, whereby the absent defendants are brought into court through their property, the suit cannot be maintained, for, under the settled jurisprudence of this state, attachment suits cannot be maintained on a claim for damages arising *ex delicto*. 2 An. 943; 3 id. 436; 12 id. 110.

It is therefore ordered, adjudged and decreed that the judgment of the district court be affirmed, with costs of appeal.

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ACCEPTANCE.

See BILL OF EXCHANGE.

ACTION.

In an action to recover the value of property alleged to have been stolen from the plaintiff by the defendant, *held*, that the right of action was not suspended until the determination of a criminal prosecution against the offender. *Hawk v. Minnick*, 413.

2. An action may be maintained on a judgment rendered by a court of competent jurisdiction in another state, notwithstanding an appeal from such judgment is pending. *Taylor v. Shew*, 478.

See PROMISSORY NOTE, 1, 4; REWARD.

ADMINISTRATOR.

1. Acquiescence in the payment of funds by an administrator to certain persons under mistake of the legal rights of such persons does not estop the true heir from asserting her claim to such funds on being apprised of her rights. *Davis v. Bagley*, 570.
2. An administrator, who in good faith makes investments of funds in his possession, which, on account of subsequent events beyond his control, become worthless, is relieved from responsibility under the constitution and laws of this state; and an administrator, who pays funds to persons at the time apparently entitled to such payment, but afterward found to be not entitled, is protected under the said relief provisions. *Id.*

ADMIRALTY.

An attachment was issued against a vessel navigating the Yazoo and Mississippi rivers, to recover for repairs. These rivers were navigable by vessels of ten tons burden and upward from the sea; the vessel was a steamboat owned and having her "home port" in Mississippi. *Held*, that the vessel was within the maritime jurisdiction of the United States; that the state courts had no jurisdiction of the subject-matter, and could not be invested with such jurisdiction by the legislature of the state. *Dever v. Steamboat Hope*, 643.

ADMIRALTY LAW.

See JURISDICTION.

INDEX.

ADMISSION.

See EVIDENCE, 2.

AGENT.

1. A person who voluntarily employs the agent of another, knowing the fact of such existing agency, is estopped from pleading the rule that the same person cannot be agent of two principals having conflicting interests. *Fitzsimmons v. The Southern Express Co.*, 577.
2. Where an express company receives goods directed in a peculiar manner to the care of its agent at a specified place, it will be assumed that the shipper intended to make such agent his own agent for receiving the goods, and the express company is discharged from responsibility in delivering the goods to such agent. *Ib*

See CARRIER, 10; INSURANCE, 5; PRINCIPAL AND AGENT, 1; PROMISSORY NOTE, 1.

ALIMONY.

See DIVORCE.

ALTERATION.

See CONVEYANCE, 2.

ANCIENT LIGHTS.

See EASEMENT.

ASSESSMENT.

See MUNICIPAL CORPORATION.

BANK.

1. When a bank, organized under the laws of a state, re-organizes as a national bank under the act of congress, it escapes none of its liabilities by the change. *Coffey v. The National Bank of the State of Missouri*, 488.
2. In an action of trover against a bank, after its re-organization as a national bank, for the value of certain special deposits in coin made prior thereto *held*, that the measure of damage was the value of the coin at the date of its conversion, with interest thereon. *Ib*.

BANKRUPTCY.

1. A discharge in bankruptcy cannot be impeached in a state court for any cause which would have prevented the granting of the discharge under the bankrupt act, or would have been sufficient ground for annulling the discharge in the United States court under that act. *Corey v. Ripley*, 19.
2. The authority to set aside and annul a discharge in bankruptcy under the act of 1867 rests exclusively in the United States courts. *Ib*.
3. After judgment in an action and appeal taken by the defendants, he was adjudged a bankrupt by the register in bankruptcy, and filed the adjudication in the appellate court. On application for a stay of proceedings, *held*, that the judgment was final within the contemplation of section 21 of the

bankrupt act, and that the stay could not be granted. *Merritt v. Glidden*, 479.

4. Notice of an adjudication in bankruptcy does not justify a sheriff who has seized property under an execution from a state court for refusing to sell such property where it has not been ordered into the bankruptcy court *Shannon v. Howell*, 576.

BELLIGERENT RIGHTS.

In an action of trespass for inducing confederate soldiers to cut and take plaintiff's timber, etc., it appeared that the plaintiff and defendant owned adjoining farms; that during the war the surrounding country was at times occupied by the confederate army, which, on one occasion, cut a large amount of valuable timber from plaintiff's farm, and took and used other of his property at the suggestion and by the advice, as was alleged, of the defendant, who sympathized with the confederate cause. *Held*, that the cutting of the timber and taking of the property being by virtue of belligerent rights, the plaintiff could not recover.

Held, further, that the belligerent rights of both parties to the war were the same and equal in extent. *Smith v. Brazelton*, 678.

BILL OF EXCHANGE.

W. drew a bill of exchange on G., made payable to his own order on a day certain at the Ocean Bank, New York. At maturity the bill was presented at the bank for payment, and duly protested for non-payment. G. was in funds at the time, and would have paid the bill had he known of its existence, but he afterward became insolvent. In an action by the indorser against the drawer, *held*, that the holder of the bill was not bound to present it to the drawee for acceptance; that it was the duty of the drawer to have notified the drawee of the bill, and that presentment at the bank was sufficient to charge the antecedent parties. *Walker v. Stetson*, 406.

BLANK NOTE.

See PROMISSORY NOTE, 2.

BONDS.

See STAMPS, 1.

BOND OF INDEMNITY.

The plaintiff had delivered to the defendants goods, subject to a lien for freight charges in favor of C.—from whom plaintiff had received them—without collecting such charges, upon receiving from the defendants a bond conditioned to indemnify the plaintiff “against any legal liability which he may have incurred” by so doing. Judgment was recovered by C. against the plaintiff for the amount of such charges and cost, but it did not appear that it had been paid. In an action upon the bond, *held*, that the plaintiff could not recover, as there was no proof of actual damage. *Weller v. Barnes*, 150.

BOUNDARY.

See RIGHT OF WAY.

depreciated in value, and on its arrival in B. the purchaser declined to receive it on account of this delay, and the plaintiff was compelled to sell it at a diminished price. *Held*, that plaintiff could recover damages for the depreciation in its market value, and also for the loss of his chance to sell. *Deming v. Grand Trunk Railway Co.*, 267.

8. The plaintiff made a contract with the defendant for the transportation of stock at a certain rate, wherein it was stipulated that the person riding free to take charge of the stock should do so at his own risk of personal injury, from whatever cause. At the same time, without additional consideration, the defendants gave him a "drover's pass," entitling him to go with the stock and return by a passenger train. On this pass was an indorsement stipulating that "the person accepting this free ticket assumes all risks of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence by their agents, or otherwise, for injuries to the person," nor as common carriers. The plaintiff received the pass with knowledge of its contents, accompanied the stock, and was injured on his return by the negligence of defendant's servants. *Held*, that the plaintiff was not a gratuitous passenger, and that the contract and stipulation against liability for negligence was against the policy of the law and void, and, therefore, no defense to an action for the injury. *The Cleveland, Painesville, etc., R. R. Co. v. Curran*, 362.
9. The defendant, a railroad company, whose road extended from Cincinnati to Dayton, was engaged in shipping goods from Cincinnati to New York, under an agreement with other companies, whose roads extended from Dayton to New York, for rates of through freight to be fixed by the receiving company, and collected by the delivering company, and divided *pro rata* among them. The defendant received goods at Cincinnati consigned to New York, and gave a bill of lading therefor, stating therein that the goods were to be transported by its line to its terminus, and then delivered to the connecting line; it being further agreed, that, in case of loss during transportation, the company alone in whose custody they were at the time of the loss should be held liable. *Held*, that defendant contracted to carry the goods to Dayton only, and was not responsible for loss happening on connecting line. *The Cin., Ham. & Dayton and Dayton & Mich. R. R. Co. v. Pontius*, 391.
10. The defendants received from plaintiff's agent a package of gold for transportation. The defendants' clerk in charge of the office was informed, at the time, of the contents of the package, and directed to collect for its carriage from the person receiving it. The package was lost while being transported. *Held*, that the defendants were liable for the full value of the package, and that the fact that the plaintiffs' agent accepted a receipt in which it was set forth that the package was an ordinary one, and that the liability of the company therefor, in case of loss, should not exceed \$50, did not operate to so limit its liability. *Kemper v. Southern Express Co.*, 719.

See AGENT; CARRIER OF PASSENGERS; MASTER AND SERVANT, 1-4.

CARRIER OF PASSENGERS.

1. Carriers of passengers by railroad are bound to exercise the highest degree of care and diligence in the conduct of their business, and are responsible for the smallest negligence. *Taylor v. Grand Trunk Railway Co* 229.

2. In an action against a railroad company to recover for injuries sustained by an accident, the court charged the jury that "defendants must use such degree of care as is practicable short of incurring an expense which would render it altogether impossible to conduct the business." *Held*, to be erroneous, as making the ability of the corporation the measure of the care and diligence required. While, as a rule, railroad corporations are not bound to exercise such a degree of care as would render it practically impossible to continue this mode of transportation, yet the standard of care and diligence for a particular railroad cannot be made to depend upon its pecuniary condition. It is bound to provide all the agencies suited to the nature and extent of the business it purposes to do, irrespective of any fluctuation in its revenue. *Held*, further, that a charge to the jury, that if they found that the accident was caused by the gross negligence of defendants, they might in their discretion give exemplary damages, was correct. *Id.*

See CARRIER.

CERTIFICATE OF DEPOSIT

On receiving a deposit of \$750 the defendants, bankers, issued a certificate of deposit, payable to the order of the depositor. By a mistake in filling up the body of the certificate, the sum was written "fifteen hundred," instead of seven hundred and fifty. The figures on the upper left-hand corner were for the correct amount. On the same day the payee transferred the certificate to an indorsee for value, and the indorsee transferred it to plaintiffs to be credited, and a portion to be applied on an indebtedness, which was done. In an action to recover the full amount named in the certificate, *held*, that the plaintiff, being a *bona fide* holder, was entitled to recover the full amount. *Held*, further, that the fact that the transfer to the first indorsee was made in a gambling room, and in a gambling transaction, did not render the transfer void under an act against gaming, there being no evidence that the consideration therefor was money or other thing of value lost or won at the games prohibited. *Poorman v. Miles & Co.*, 451.

CERTIFICATE OF ELECTION.

See ELECTION.

CITY.

See MUNICIPAL CORPORATION.

COMMON CARRIER.

See CARRIER; PASSENGER CARRIER.

COMMON COUNCIL.

See MUNICIPAL CORPORATION, 2.

COMPROMISE

See CONSIDERATION.

CONFEDERACY.

1. B. sued C. for taking and carrying away two bales of cotton. C. had purchased the cotton in 1864, at a regular tax sale made by a collector of taxes for the confederate states government for taxes due that government from B. Both parties were residents in and adherents to the confederate states during the war. *Held*, that B. could not recover. *Cassell v. Backrack*, 590.
2. The confederate states government was a *de facto* government so far as relates to its own citizens and adherents, and all consummated transactions under it between such citizens, not in conflict with the constitution and laws of the United States, will not be disturbed by the courts. *Ib.*
3. The plaintiff, in payment of a tax, levied by the state on his cotton, in 1866, tendered to the sheriff a "cotton note," issued under an act of the confederate legislature of 1861, and made receivable in payment of all present or future taxes. The sheriff refusing to receive the note, plaintiff brought suit for an injunction to restrain the sale and compel acceptance. *Held*, that the confederate state government being neither a *de jure* nor *de facto* government, its acts were not binding on a succeeding lawful government; and that the notes in question, being issued in aid of the rebellion, were void, and, therefore, not receivable. *Thomas v. Taylor*, 625.

See CONTRACT, 9.

CONFEDERATE MONEY.

1. In an action on a note given in Louisiana for a loan of confederate money, *held*, that the courts of Mississippi would not enforce the contract, since the courts of Louisiana had declared all contracts, the consideration of which was confederate money, illegal and void. *Ivey v. Lalland*, 606.
2. A trust deed contained a power to sell real estate in payment of a note made in 1863, in consideration of "confederate treasury notes," and renewed in 1865. *Held*, that neither the deed nor the note was void. *Sherfy v. Argendbright*, 690.

CONNECTING LINE.

See CARRIER, 4, 5, 6, 9.

CONSIDERATION.

The compromise of a doubtful and conflicting claim is a good consideration for a new agreement. *Pitkin v. Noyes*, 218.

See PROMISSORY NOTE, 4; SLAVES.

CONSTITUTIONAL LAW.

1. The legislature passed an act exempting from taxation all property used for the purpose of manufacturing salt, and offering a bounty of ten cents a bushel for salt manufactured in the state. Two years later the said act was amended, by limiting the exemption from taxation to five years. The five years having elapsed, the complainant, a corporation for the manufacture of salt, organized after the passage of the original act, filed a bill to restrain the collection of a tax upon their property, on the ground that the exemption from taxation was in the nature of a contract between the state and the parties acting under it, and therefore protected by the United States consti-

tution. *Held*, that the act was not in the nature of a contract, and could be amended or repealed at any time. *East Saginaw Manufacturing Co. v. City of East Saginaw*, 82.

2. A statute provided that any person suffering loss by reason of the maiming, killing or worrying of his sheep by dogs, may present proof of the nature and extent of his damages to the selectmen of the town, who shall draw an order for the amount in his favor upon the treasurer of the town, and thereupon the town may recover of the owner of the dog the full amount of such order. *Held*, to be unconstitutional, in so far as it undertook to bind the owner of the dog by the decision of the selectmen fixing the amount of the damage without giving him an opportunity to be heard on the question. *Held*, further, that the town could nevertheless recover, under the statute, from the owner of the dog, the actual damage which the jury who try the cause find the owner of the sheep to have suffered, not exceeding the amount of the order drawn by the selectmen. *East Kingston v. Towle*, 174.
3. Evidence tending to prove that the dog had killed or worried sheep before is inadmissible in such action. *Id.*
4. A statute authorizing the grand jury, where an infant under the age of sixteen years is charged with crime, and the charge appears to be supported by evidence sufficient to put the accused upon trial, instead of finding an indictment, to return to the court that the accused is a suitable person to be committed to the house of refuge, and directing the court thereupon to order the commitment without trial by jury, is constitutional. *Prescott v. The State*, 388.
5. Under and in pursuance of an act of congress, "The National Asylum for Volunteer Soldiers," was established in Ohio upon land acquired by the United States, and jurisdiction over which had been ceded by the state to the United States, and contained inmates, some of whom were, and others were not, residents of Ohio at the time of entering. At an election held in the county wherein the asylum was situated, certain of the inmates were allowed to vote. *Held*, that, as the asylum was a "needful building" within the provision allowing the United States to acquire land, and the United States had exclusive jurisdiction over it, the inmates were not residents of the state, and therefore not entitled to vote. *Sinks v. Reese*, 397.
6. Under a section of the constitution requiring all bills passed by the legislature to be presented to the governor for his approval, to be returned with his objections in case of non-approval; and providing, "that if any bill shall not be returned by the governor within ten days after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return," the governor sent to the legislature a bill not approved, with his objections, on the tenth day, and before the usual hour for adjournment. The legislature had, however, adjourned to the day following, and the messenger returned the bill to the governor, who retained it thereafter. *Held*, 1. That the governor had not returned the bill within the meaning of the constitution. 2. That the legislature had not, by adjournment, prevented such return, the adjournment not being final. 3. That the court had jurisdiction to compel the governor by mandamus, to cause the bill to be authenticated as a statute. *TEMPLE, J.*, dissenting. *Harpending v. Haight*, 432.

See MUNICIPAL CORPORATIONS, 3; STATUTE OF LIMITATION, 2; TAXES.

CONTEMPT.

See JURISDICTION, 2.

CONTINUING GUARANTY.

See GUARANTY.

CONTRACT.

1. Under a statute providing that, in all contracts for or relating to labor, ten hours of actual labor shall be taken to be a day's work, unless otherwise agreed by the parties, the plaintiff worked for the defendant from November to April, each day from sunrise to sunset, under an agreement for \$2.50 a day, without any agreement as to how many hours should constitute a day's work. The plaintiff brought suit to recover \$2.50 for each actual day's work; the defendant claimed that he was entitled to \$2.50 for each ten hours' work only. *Held*, that it was for the jury to determine whether or not the work done by the plaintiff in a day was, by the understanding and implied agreement of the parties, to be taken as a day's work. *Brooks v. Cotton*, 172.
2. A., having a life estate in certain lands and owning stock thereon, conveyed the same to defendant on condition that he should support her for life, which he did. After her death her executor brought action to recover for use and occupation of the lands and for value of the property, alleging that the conveyance was void, A. being mentally imbecile at the time it was made. *Held*, that the plaintiff could not recover in the absence of bad faith or fraud on the part of the defendant. *Young v. Stevens*, 202.
3. On the 1st of January plaintiff made a parol contract with defendant to sell him all the wood upon a certain lot, at five dollars a cord, and to deliver as much thereof as he could that winter, and the balance the winter and year following, the defendant to pay on demand for amount delivered at the close of each winter's delivery. Plaintiff delivered a portion of the wood that winter, which was accepted and paid for; the remainder he delivered the winter and spring following, but defendant refused to accept or pay for it. *Held*, that the contract was entire; that the delivery and acceptance of the first part took the case out of the statute of frauds; and that it was not a contract which was not to be performed within one year from the making of it, within the meaning of the statute. *Gault v. Brower*.
4. Plaintiff made a parol contract with defendant, whereby the latter was to raise three acres of potatoes and deliver them to plaintiff at a stipulated price per bushel. In an action for non-delivery, *held*, that it was a question for the jury to determine, whether, under the contract, the defendant was bound to raise the potatoes himself, in which case it would be a contract for work, labor and materials, and not within the statute of frauds, or whether he might procure them by purchase or otherwise, which would render it a contract of sale, and therefore void. *Pitkin v. Noyes*, 218.
5. A contract for the sale or conveyance of property, to hinder or delay creditors, is only illegal as to creditors; as between the parties and all others, it is legal and valid, and can be enforced in all its terms as any other contract. *Springer v. Drosch*, 353.

6. The plaintiff was injured, through negligence of defendant, while traveling on defendant's train, in the state of New York, under a contract made and to be executed therein, and valid by the laws thereof, by the terms of which the plaintiff was to be carried gratuitously, and was to assume all risks of injury arising through negligence of defendant's servants, or otherwise. *Held*, that the validity of the contract must be determined by the laws of New York, and that, it being valid in that state, the plaintiff could not recover. *Knowlton v. The Erie Railway Co.*, 395.
7. The only ground upon which a father can be made liable for debts contracted by a minor son is that of an express or implied agency, and, in an action against the father to recover for a purchase made by the son, it is for the jury to determine whether such agency existed. *Holt v. Baldwin*, 515.
8. An agreement to deliver specific articles, to be worth a specified amount, is legally fulfilled by the payment of the money in lieu of the articles. *Sims v. Cox*, 560.
9. B. gave certain military companies ten bales of cotton to aid in equipping them for the confederate service, which the agent of the companies sold to A. while yet undelivered. B. gave a receipt for the purchase-money, in which he agreed to hold the cotton subject to the order of A. Upon failure to deliver a portion of the cotton action was brought for the value. *Held*, that, although the transaction was illegal as between B. and the military companies, the contract sued on was subsequent and distinct, unaffected by the original transaction, and therefore valid. *Holt v. Barton*, 640.

See BREACH OF PROMISE; CARRIER, 2, 9; CONFEDERATE MONEY; CONSTITUTIONAL LAW; COVENANT, 1, 2; FOREIGN LAW, 2; MARRIAGE CONTRACT; SLAVES; WAR.

CONTRIBUTION.

See SURETIES, 3, 4.

CONTRIBUTORY NEGLIGENCE.

See RAILROAD COMPANY, 2.

CONVEYANCE.

1. A., owning certain lands, and intending to convey the same to his daughter as a gift, executed a deed, in which, through a mistake of the draughtsman, the premises were incorrectly described, and the name of the daughter's husband inserted instead of her own as grantee. No consideration was paid or promised for the conveyance, although a consideration was named in the deed. The deed was delivered to the daughter and duly recorded, and she was placed in possession. Afterward the husband executed a mortgage, containing the same erroneous description of the premises, to a *bona fide* mortgagee, who, upon foreclosure, purchased the premises, and took a sheriff's deed containing the same erroneous description. Suit was brought by purchaser to correct the description; whereupon A., having then first discovered the error in his former deed, executed and delivered to his daughter another voluntary deed, wherein she was named as grantee, and the premises correctly described. *Held*, 1. That

the purchaser having acted in good faith, and without any notice of defect in the husband's title, A. was estopped from denying that the deed to the husband was made in good faith, or that the grantee was properly named therein. 2. That the daughter, being a voluntary grantee, had no claim, either under the original deed or under the one executed pending suit. 3. That the deed to the husband was not void for uncertainty in the description of the premises conveyed, and that the plaintiffs were entitled to have their deed reformed. *The German Mutual Insurance Co. v. Grim*, 841.

- 2 Where a person conveyed land by a deed, which was not recorded, and his heir, after his death, conveyed the same land, by a deed which was duly recorded, to an innocent purchaser, for value, *held*, that the recorded deed from the heir operated to divest the title of the grantee in the unrecorded deed from the ancestor. *Youngblood v. Vastine*, 509.
3. An alteration in a deed of conveyance by a grantee after delivery does not affect the legal title or re-invest the same in the grantor, although a fraudulent and material change may disable the holder from bringing an action upon its covenants. *Woods v. Hilderbrand*, 513.
4. A deed filed for record in a recorder's office, and recorded, is notice to subsequent purchasers, notwithstanding the failure of the officer to index it. *Bishop v. Schneider*, 533.
5. When it is provided by statute that, in order to the registration or recording of a conveyance, the deed shall be acknowledged before some officer, and a certificate thereof entered upon the deed, if the deed is entered without the prescribed acknowledgment the recording or registration will not be constructive notice to any one. *Id.*

See HUSBAND AND WIFE, 4

CONVICTION.

See CRIMINAL LAW.

CORPORATION.

1. A corporation is liable to exemplary or punitive damages for such acts, done by its agents or servants, acting within the scope of their employment, as would, if done by an individual acting for himself, render him liable for such damages. *The Atlantic & Great Western Railway Company v. Dunn*, 382.
2. A corporation cannot, by resolution or by-laws, impose personal and individual liability upon its members, unless the power is specifically granted in the charter or by general statute. The capital stock is the fund out of which the debts of a corporation must be paid, and dividends of profit already paid to the stockholders cannot be reached by creditors of the corporation. Funds due to a corporation (as for rent) may be reached by proper process. *Reid v. The Eatonton Manufacturing Company*, 563.

CO-SERVANTS.

See MASTER AND SERVANT, 2.

COVENANT.

1. In a contract for the sale of land the vendee agreed to pay the purchase-money in installments, and the vendor executed a bond conditioned to deliver the deed upon the payment of the last installment; *held*, that the covenants were independent and that the vendor might enforce payment of all the installments without first tendering a deed. *Bowen v. Bailey*, 601.
2. H. sold to R. lands at an agreed price, part of which was paid in cash and R.'s note given for the balance. H., at the same time, executed and delivered his bond conditioned to make title to R. when said note was paid. H. afterward assigned the note before its maturity to M., who brought action thereon after maturity. R. demurred on the ground that no deed of the land had been tendered. *Held*, that the covenant in the note and that in the bond were dependent, and that the demurrer was well taken. *Robinson v. Harbour*, 671.

See COVENANT OF TITLE.

COVENANT OF TITLE.

1. The owner of a parcel of land through which a railroad ran conveyed the land by a deed purporting to convey the entire parcel without reservations as to the right of way of the railroad. In an action of covenant, *held*, that this right of way was such an incumbrance as would constitute a breach of a covenant against incumbrance contained in the deed. *Beach v. Miller*, 290.
2. It is not necessary that there should be an actual eviction by process of law to constitute a breach of covenant of title and quiet enjoyment. Such covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title, whether that title be established by judgment or not. *McGary v. Hastings*, 456.
3. The measure of damage in an action on a covenant of title, after eviction, is the purchase-money and interest; but where the covenantee has purchased the paramount title, it is the sum actually and in good faith paid therefor and the amount expended in defending his possession, provided such damages shall not exceed the purchase-money and interest. *Ib.*

See COVENANT.

CREDITOR.

See LIEN.

CRIMINAL LAW.

Where a prisoner has been convicted and sentenced, and duly committed in pursuance of the sentence, the power of the court to revise or change the sentence is at an end. *Brown v. Rice*, 11.

CREDITORS, SALE TO DELAY.

See CONTRACT, 5.

CROPS.

See EJECTMENT.

DAMAGES.

See BANK, 2; CARRIER OF PASSENGERS; CORPORATION, 1; COVENANT OF TITLE, 2; EJECTMENT, 2; MASTER AND SERVANT.

DEED.

See CONVEYANCE.

DE FACTO GOVERNMENT.

See CONFEDERACY, 2, 3.

DISCHARGE IN BANKRUPTCY.

See BANKRUPTCY, 1, 2.

DIVORCE.

A husband deserted his wife in Ohio, where both parties, up to the time of the desertion, were domiciled, and where she remained. To a petition by the wife for divorce and alimony, the husband set up a decree of divorce obtained by him in Indiana, under proceedings in compliance with the statutes of that state, but in which there was no jurisdiction of the person of the wife except by constructive service, and of which she had no actual notice. *Held*, that her domicil remained unaffected by the desertion of the husband, and that the decree was no defense to her petition for alimony. *Cox v. Cox*, 415.

DOMICIL.

See DIVORCE.

DOWER.

Where a husband purchased lands, giving his notes as security for the purchase price, and afterward, by his sole deed, reconveyed the lands to the vendor as a satisfaction of the notes, *held*, that the wife's right of dower did not attach. *Huginin v. Cochrane*, 303.

DROVER'S PASS.

See CARRIER, 8.

EASEMENT.

The owner of two adjacent lots, having dwelling-houses thereon, conveyed one to the plaintiff and the other to the defendant, by deeds containing covenants of warranty and against incumbrance. The house purchased by plaintiff received light and air through windows opening upon an area on the lot purchased by defendant. The defendant being about to obstruct these windows by building upon and filling up the area, the plaintiff brought suit for an injunction. *Held*, that there was no grant of an easement for light and air implied from the fact that the windows were in use at the time of the conveyance, and were necessary to the convenient enjoyment of the property, and that an injunction could not be granted. *Mullen v. Stricker* 379.

EJECTMENT.

1. The owner of lands, who has recovered a judgment of ejectment against persons occupying under a claim of title, is not entitled to the crops grown and harvested by such persons before the judgment. *Page v. Fowler*, 462.
2. When, in such case, the owner obtained possession of the crops by replevin *Held*, in an action to recover their value, that the measure of damages was the highest market value within a *reasonable* time after the property was taken, with interest computed from the time such value was estimated *Ib*.

See MORTGAGE.

ELECTION.

1. The relator received from the proper officer a certificate of his election to the office of district clerk of M. county; he subsequently took the oath, gave and filed the bond required by law, and then demanded of the respondent—the former clerk, whose term of office had expired, and who was in possession—the seal, records, books, papers, etc., belonging to said office. The respondent answered that the relator, being a non-resident of the state, was ineligible to the office, and therefore not legally elected. *Held*, that the relator was entitled to a mandamus. *State v. Sherwood*, 118.
2. A certificate of election is *prima facie* evidence of title, and the court will not go behind it in proceedings for a mandamus. *Ib*.

See CONSTITUTIONAL LAW, 5.

ELECTORS.

See CONSTITUTIONAL LAW, 5.

EMPLOYER.

See MASTER AND SERVANT.

ESTOPPEL.

See ADMINISTRATOR, 1; CONVEYANCE, 1.

EVIDENCE.

1. In an action for goods sold and delivered, the plaintiff gave in evidence a written order for the goods, signed by the defendant, and proved that they were delivered according to the terms of such order. The defendant there upon offered to prove that at the time said order was made, as an inducement thereto, plaintiff verbally agreed with defendant that the latter might revoke the order during the summer and not take the goods, and that during the summer and before the delivery of the goods he did revoke said order. *Held*, that such offer was properly rejected. *Wemple v. Knapp*, 147.
2. In proof of the laws of a foreign country, the testimony of any person, whether a professed lawyer or not, who appears to the court to be well informed on this point, is competent. *Hall v. Costello*, 207.
3. On the trial of an action for goods sold and delivered, the defendant offered in evidence an execution and return of the sheriff, and a schedule of property attached thereto, verified by the plaintiff, in the case of a third person against the plaintiff, of a date subsequent to said alleged sale to the defend-

ant, this claim not being included in the list. *Held*, that, as an admission of the plaintiff, this was proper evidence. *Springer v. Drosch*, 356.

See CONSTITUTIONAL LAW, 3; ELECTION, 2; HUSBAND AND WIFE, 1, 2;
PRINCIPAL AND AGENT; RAILROAD COMPANY, 1; SLANDER, 1, 2;
STAMPS, 2; FOREIGN LAW.

EXECUTIVE POWER.

See JUDICIAL POWER.

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See CARRIER OF PASSENGERS, 2; CORPORATION.

EXPRESS COMPANIES.

See CARRIER, 2, 3.

FACTOR.

See PRINCIPAL AND AGENT

FARE.

See RAILROAD COMPANY, 1.

FIRE DEPARTMENT.

See MUNICIPAL CORPORATION, 4.

FIXTURES.

As between the vendor and vendee of lands used in growing cotton, a cotton gin-stand, put up after the usual manner for use on the place, is a fixture, and passes with the land. *Richardson v. Borden*, 595.

FOREIGN JUDGMENT.

See ACTION; INJUNCTION.

FOREIGN LAW.

1. In the absence of evidence the presumption is that the laws of another state conform in substance to the general principles of the common law. *Ellis v. Mason*, 81.
2. Plaintiff and defendant, in pursuance of an agreement to that effect, went to Canada in 1864 for the purpose of procuring men to be enlisted in the United States army, and before going, and also while there, plaintiff loaned to defendant money to pay his expenses. In an action to recover such money *held*, that the contract, having for its object the violation of a law of Canada was void, and that the plaintiff could not recover. *Hall v. Costello*, 207.

See EVIDENCE, 2.

FORWARDER.

See CARRIER, 2.

FUTURE ADVANCES

See TRUST.

GAMBLING.

See CERTIFICATE OF DEPOSIT.

GIFT.

See CONVEYANCE, 1.

GOVERNOR.

See CONSTITUTIONAL LAW, 6; JUDICIAL POWER, 1, 2.

GUARANTOR.

See SURETIES, 1, 2.

GUARANTY.

Defendant gave a letter of credit, asking plaintiff to let T. have "the paints, oils and varnishes, glass, etc., he wants. I will be security for the amount for what he will owe you." *Held*, to be a continuing guaranty. *Boehne v. Murphy*, 485.

See PROMISSORY NOTE, 4.

HIGHWAY.

In an action against a town to recover for injuries caused by a defect in a highway, the question, whether notice to the town of the existence of the defect can be inferred from the length of time it has continued, is a question for the jury. *Colley v. Inhabitants of Westbrook*, 80

See INJUNCTION; SABBATH

HUSBAND AND WIFE.

1. A married woman, engaged in business on her own account, purchased goods on credit, to be used in that business, the husband having no connection with the business, nor in any way participating in the profits therefrom. In an action against the husband for the value of the goods, *held*, that, in the absence of proof that the husband had assented to his wife's conducting the business, he was not liable for the debt. *Tuttle v. Hoag*, 481.
2. A *feme covert* is absolutely a *feme sole* with respect to her separate estate, when she is not specially restrained, by the instrument under which she acts, to some particular mode of disposition; and, although a particular mode of disposition is pointed out, it will not preclude her from adopting any other mode of disposition, unless there are words restraining her power of disposition to the very mode pointed out. *Kimm v. Weippert*, 541.
3. A married woman, having separate property, joined with her husband in a note for the purchase price of real estate purchased by the husband. To secure the payment thereof a deed of trust of the same real estate was executed by both husband and wife. Default being made in the payment, the land was sold, and suit brought to make good the deficiency out of the wife's separate estate. *Held*, that the note was not a charge on the wife's

estate. *Held, further*, that extrinsic evidence was not admissible to prove the intention of the wife to charge her separate estate. *Ib.*

- 4 When land is conveyed to husband and wife each takes an entirety, notwithstanding a statute providing that all conveyances of land made to two or more persons shall be construed to create estates in common and not in joint tenancy. *Hemingway v. Scales*, 586.

See DIVORCE; DOWER.

IMBECILITY.

See CONTRACT, 2.

INDEMNITY.

See BOND OF INDEMNITY.

INDORSEMENT.

See PROMISSORY NOTE.

INFANT.

See MARRIAGE CONTRACT.

INJUNCTION.

1. Where it does not appear that a person will sustain any special or peculiar damage in consequence of the obstruction of a public highway, an injunction to restrain such obstruction will not be granted at his suit. *Dawson v. The St. Paul Fire Insurance Co.*, 109.
2. The courts of one state may enjoin a citizen thereof from enforcing the collection of a judgment which he obtained in the courts of another state, and which he is endeavoring to collect in such other state. *Engel v. Schauer man*, 578.

See EASEMENT.

INSANE PERSON.

See INSURANCE, 3.

INSURANCE.

I. *Fire Insurance.*

1. Where insured goods are removed from a building apparently in imminent danger of being destroyed by fire, the insurers are liable for the reasonable damage and expense of removal, although the building is not in fact burned. *White v. Republic Fire Insurance Co.*, 22.
2. A policy, the premium for which had been paid by note, contained a provision that in case the note should not be paid at maturity, the full amount of the premium should be considered as earned, and the policy become void while said past-due notes remained over-due and unpaid; a loss occurred after the maturity of the note and before it was paid. *Held*, that the company was not liable for any loss which occurred during the continuance of the default, but that, on the subsequent payment of the note, the policy

revived and was in force from the date of such payment. *Williams v. The Albany City Insurance Co.*, 95.

3. The plaintiff's buildings, which were insured, were intentionally set on fire by his wife, who was insane, and who had been left alone by the plaintiff. It appeared that she had frequently been left alone before this occasion. In an action on the policy of insurance, *held*, that the plaintiff, in leaving his wife alone, had not been guilty of such a degree of negligence as would constitute a defense for the defendants. *Gove v. The Farmers' Mutual Fire Insurance Co.*, 168.
4. A policy of insurance requiring that consent to subsequent insurance upon the same property should be in writing, will not be rendered void when the agent of the company gives such consent *verbally*, and the insured, in good faith, acts upon it. *Carrugi v. The Atlantic Fire Insurance Co.*, 567.
5. The powers of an agent, whose duty it is to take and revoke risks, include the power of consenting to a prior or subsequent insurance on the property. *Ib.*

II. *Marine Insurance.*

6. To warrant the abandonment of a stranded vessel as a total loss, it must appear, to the satisfaction of the jury, that the delivery of the vessel from the peril was, upon reasonable grounds, judged to be impracticable, or not to be effected unless at an expense that would absorb all her value. *Copelin v. The Phœnia Insurance Company*, 504.
7. The owner of a vessel, abandoned as a total loss, is not bound to receive her from the underwriters if there is any material deficiency in her repairs, nor unless she be repaired and returned within a reasonable time. *Ib.*

INTEREST.

See PROMISSORY NOTE, 8; WAR.

INTOXICATING LIQUORS.

See NUISANCE.

JOINDER OF PARTIES.

See REWARD.

JUDICIAL POWER.

1. In organisation of the federal and state governments, three separate bodies of magistracy were established, the legislative, executive and judicial. It was intended that the functions of each of these should be separate and distinct within its own sphere, and, as far as practicable, independent of those of the other branches. Neither branch is permitted to exercise the powers appropriately belonging to another. *State v. Warmoth*, 712.
2. The doctrine that there is a distinction between a purely ministerial act and one in the discretion of the executive, and that the performance of the former by the executive may be enforced by judicial order, accords to the judiciary the large discretion of determining the character of all acts which would infringe the right of the executive to use discretion in determining the same question. *Ib.*

3. Therefore a writ of mandamus will not issue to compel the chief executive to perform an act required by law to be done by him. *Ib.*

JURISDICTION.

1. Where the United States court and a state court have a concurrent jurisdiction, the court first acquiring jurisdiction of any matter retains it to the exclusion of the other. *Hines v. Hobbs*, 581.
2. Where parties commence proceedings in a state court, and in the course of litigation are enjoined from further action until certain matters are disposed of, it is a violation of the injunction order to institute proceedings in the United States court involving the matters enjoined; and the state court has power to punish the disobedience of its orders, although it cannot require the parties to dismiss their suit in the United States court. *Ib.*
3. A proceeding *in rem* against a vessel for the recovery of damages for a maritime tort can be enforced only by the courts of the United States. *Young v. Ship Princess Royal*, 781.

See ADMIRALTY; NATURALIZATION; SURETIES, 3.

LEASE.

See LESSOR AND LESSEE

LEGACY.

See WILL.

LESSOR AND LESSEE.

A covenant by a lessor to erect a building on the leased premises does not by implication impose upon him an obligation to rebuild in case of the destruction of the building by fire during the term of the lease; nor does the destruction of the building and the refusal of the lessor to build relieve the lessee from his agreement to pay rent. *Cowell v. Lumley*, 430.

LEGISLATIVE POWER.

See MUNICIPAL CORPORATION, 1, 3; RIPARIAN RIGHTS, 2.

LEX LOCI.

See CONFEDERATE MONEY, 1; CONTRACT, 6; MARRIAGE CONTRACT.

LIEN.

Where a debtor, with the assent of certain of his creditors, placed his personal property in the hands of one of them, with instructions to sell it, and pay himself and such other creditors out of the proceeds, *held*, that the creditors for whose benefit the property was to be applied obtained a lien upon it and its proceeds superior to any which a general creditor could acquire by the subsequent levy of an attachment thereon. *Handley v. Pfister*, 449.

See VENDOR'S LIEN.

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MARITIME JURISDICTION.

See ADMIRALTY.

MARITIME LAW.

See JURISDICTION.

MARRIAGE CONTRACT.

- 1 An ante-nuptial contract was made in the state of Mississippi by a female minor with her intended husband. The contract was to be carried out in the state of Louisiana, where the husband and wife resided after marriage. *Held*, that the capacity of the parties, as well as the form of the contract, must be governed by the laws of Mississippi, while its effect must be governed by those of Louisiana. *Succession of Jesse W. Wilder*, 731.
- 2 To ascertain whether such a contract is for the benefit of the minor, so as to determine whether it is void or voidable, the *lex loci contractus* alone must be considered. *Ib.*
- 3 Under the common law, as administered in the United States, the general rule is, that the contracts of minors are voidable only, and not void. The exception is, where the contract on its face appears necessarily prejudicial to the minor. *Ib.*
- 4 Where nothing appears on the face of a marriage contract necessarily prejudicial to the minor wife, it is voidable only, and, if not disaffirmed by her when she has the capacity so to do, will be binding on her. *Ib.*

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. The plaintiff, a passenger in defendants' railway car, gave up his ticket to a brakeman, who was authorized to demand and receive it. Shortly after the latter approached plaintiff, denied that he had received his ticket, and assaulted and grossly insulted him. In an action against the railway company to recover damages, *held*, that the defendants were liable, and that plaintiff could recover exemplary damages. (TAPLEY, J., dissented on the question of damages.) *Goddard v. Grand Trunk Railway Co.*, 39.

2. The defendants having retained the brakeman in their employ after notice of his conduct, the court refused to set aside as excessive a verdict for \$4,850. *Id.*
3. The plaintiff, a deck hand on the steamboat A., was injured by the explosion of the boiler of the steamboat R., while the boats were near each other. The defendant was owner of the steamboat A., but had an agreement with the owner of the steamboat R. that each should employ the men and manage his own boat, and at the end of the season the profits of the boats should be divided between them. In an action to recover damages for such injury, *Held*: 1. That the defendant and the owners of the R. were partners, and each responsible for the negligence of the officers and crew of each boat. 2. That the plaintiff and the crew of the R. were not fellow-servants within the rule exempting the master from liability for injuries sustained by a fellow-servant. *Connolly v. Davidson*, 154.
4. The plaintiff, a passenger on defendants' road, applied to the baggage master to have his trunk checked, which not being promptly done, the plaintiff became angry and used threatening and abusive language, whereupon the baggage master seized a hatchet and struck him. *Held*, that the company was not liable. *The Little Miami Railroad Co. v. Wetmore*, 373.
5. The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business, and where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of the work, the employer is liable, provided he knew or might have known, by the exercise of reasonable care, that the apparatus was unsafe. *Gibson v. The Pacific R. R. Co.*, 497.

MEASURE OF DAMAGE.

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MISTAKE OF LAW.

See ADMINISTRATOR, 1.

MORTGAGE.

A mortgage does not convey the legal title, and a defendant in ejectment can not set up a mortgage with which he is not connected as an outstanding title *Woods v. Hilderbrand*, 512.

MUNICIPAL CORPORATION.

1. The legislature may authorize a municipal corporation to assess the whole or any portion of the expenses of local improvements upon the property deemed to be particularly and specially benefited thereby, in proportion to the benefit received. *Hoyt v. City of Saginaw*, 76.
2. Where the charter of a city provides, that, whenever the common council shall deem any improvement in streets, etc., necessary, they shall so declare by resolution, such declaration must be made before the common council have authority to order the improvement. *Id.*
3. An act of the legislature for establishing and improving a public park in the city of Chicago, after providing for the appointment of a board of commissioners, with authority to purchase lands, provided further, that, for the purpose of paying for such lands, the bonds of the city of Chicago, to such an amount as should be necessary, should be issued by the mayor, comptroller and clerk of said city, from time to time as the same should be required by the board of park commissioners, and that they should be delivered to said board upon demand. In pursuance of this authority, the board of park commissioners determined that bonds of said city should be issued to the amount of \$500,000, for the purpose specified, and applied to the city officers named to issue such bonds, which they refused to do. On an application to the court for a writ of mandamus to compel such officers to issue and deliver said bonds, *held*, that the legislature had no power under the constitution to compel a municipal corporation to incur a debt for local improvements, without its consent, and that therefore a mandamus would not be granted. *People v. Mayor, etc., of Chicago*, 278.
4. A city, authorized by statute to establish a fire department and procure engines, etc., necessary to extinguish fires, is not liable to an individual whose house has been burned, for any defect in the execution of such power, nor for a neglect of duty on the part of fire companies or their officers. *Wheeler v. City of Cincinnati*, 368.

See BRIDGES.

NATIONAL BANK.

See BANK.

NATIONAL CURRENCY.

The circulating notes of national banks, known as "national currency," are not exempt from taxation by a state. *Board of Commissioners of Montgomery County v. Elston*, 327.

NATURALIZATION.

A court having original jurisdiction of some actions cognizable by the courts of law under what is known as the "common law of England," has "common-law jurisdiction," within the meaning of the third section of the act of congress of April 14, 1802, relative to the naturalization of foreigners. *In the matter of Martin Connor*, 437.

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NEGLIGENCE.

See INSURANCE, 8; MASTER AND SERVANT, 5; RAILROAD COMPANY, 2, 2.

NEGOTIABLE INSTRUMENT.

See BILL OF EXCHANGE; PROMISSORY NOTE; WAREHOUSE RECEIPT.

NOTE.

See PROMISSORY NOTE.

NOTICE OF DEFAULT.

See SURETIES.

NOTICE OF PROTEST.

See PROMISSORY NOTE, 8.

NUISANCE.

An ordinance of a town declaring a nuisance all intoxicating liquors kept within the limits of the town for the purpose of being sold or given away as a beverage to be drunk within said town, and directing the police officers to abate said nuisance by removing the liquors beyond the town limits, will not justify such officers in seizing and carrying away liquors until it has been determined by a court of justice that the ordinance has been violated. *Dart v. People*, 301.

OBSTRUCTION OF HIGHWAY.

See INJUNCTION.

OFFICIAL BONDS.

See STAMPS, 1.

ORDINANCE.

See NUISANCE.

PARTIES, JOINDER OF.

See REWARD.

PARTNERSHIP.

Where the creditors of a partnership have levied their execution on lands belonging to one of the partners, and their title has become absolute by lapse of the time prescribed by statute, a creditor of the individual partner cannot defeat their title by levying his attachment or execution on the same lands. *Bunker v. Smith*, 189.

PASSENGER CARRIER.

See CARRIER OF PASSENGERS.

PERSONAL LIABILITY.

See PROMISSORY NOTE, 1.

POLICE POWER.

See NUISANCE.

PRINCIPAL AND AGENT.

A foreign factor sold merchandise to the defendant in his own name, and without disclosing his principal, and received his own check in part payment therefor: *Held*, in an action by the principal to recover the price of the merchandise thus sold, that, in the absence of proof that the defendants knew of the representative character of the factor, the principal could not recover. *Traub v. Milliken*, 14.

PROMISSORY NOTE.

1. The secretary of an incorporated company gave a promissory note, using the words "We promise to pay," etc., and signed it with his own name with "Sec'y" affixed, and impressed thereon the seal of the corporation. *Held*, that he was not personally liable thereon. *Means v. Swormstedt*, 830.
2. A. indorsed a blank form of a promissory note and delivered it to the maker, stipulating that it should not be made payable at a bank. In filling up the note the maker made it payable at a bank, and in that condition negotiated it. *Held*, that A. was liable on the note in the possession of a *bona fide*. *Spittler v. James*, 334.
3. Where a promissory note contains a provision for interest, an action may be maintained for the interest after the principal has been paid. *Robbins v. Cheek*, 348.
4. The owner and holder of a promissory note transferred it to the plaintiff, and, at the same time, indorsed thereon the following: "I guarantee the payment of the within note to C. Edgerton or order.— Isaac Clay." In an action on the guaranty, *held*, first, that no consideration for the guaranty need be alleged; second, that, as the guaranty was absolute, no averment of demand and notice was necessary. *Clay v. Edgerton*, 422.
5. If a person not a party to a note places his name in blank on the back thereof before delivery, he is to be regarded as an indorser, and demand and notice are necessary in order to fix his liability. *Jones v. Goodwin*, 473.
6. The maker of a promissory note altered its date without the knowledge or consent of the surety thereto, after execution, but before delivery. *Held*, that the surety was discharged by the alteration. *Britton v. Diorker*, 553.
7. In an action by the administrators of the payee of a promissory note made in 1859 and payable "in gold" against the sureties thereto, the latter interposed the defense that the words "in gold" were inserted by the payee without their knowledge or consent after delivery. *Held*, that the alteration did not change the legal liability of the sureties, and that they were therefore liable. *Bridges v. Winters*, 598.
8. Where, a short time previous to the maturity of a note, an indorser dies, a proper notice of protest of the note sent to such indorser's address, the holder and notary being ignorant of his death, and actually reaching the

administrator and one of the heirs, will be sufficient to bind the estate
Maspere v. Pedesclaus, 727.

See SLAVES, 1,

PROTEST.

See PROMISSORY NOTE, 83.

PUNITIVE DAMAGES.

See CORPORATION.

RAILROAD COMPANY.

1. By the regulations of defendants, a railroad company, persons taking passage in their cars, at a place where a ticket office was established, without having first procured a ticket, were charged ten cents in addition to the regular fare. The plaintiff, finding the ticket office closed, entered the cars without a ticket, intending to go to M.; made known to the conductor his destination, and gave him fifty cents, which was the regular fare; the conductor demanded the additional ten cents, which was refused, and the plaintiff was expelled at J., the car fare to which was fifty cents. *Held*, in an action for damages: 1, that the conductor, having accepted and retained the fifty cents, could not afterward eject the plaintiff; 2, that evidence was inadmissible to show the car fare to J.; and, 3, that the company, in order to enforce said regulations, were bound to keep their ticket office open a reasonable time in advance of the departure of train, to enable passengers to procure their tickets. *Du Laurans v. The First Division of the St. Paul & Pacific R. R. Co.*, 102.
2. The plaintiff, while traveling in defendants' railroad car, permitted his arm to rest on the window-sill and slightly project outside, whereby his arm was broken by coming in contact with a freight car standing near the track. *Held*, that the negligence of the defendants was gross in comparison with the plaintiff's, and that the latter could recover. *Chicago & Alton R. R. Co. v. Pondrom*, 306.
3. The citizen who, on a public highway, approaches a railroad track and can neither see nor hear any indications of a moving train, is not chargeable with negligence in assuming that there is no car sufficiently near to make the crossing dangerous. He has a right to presume that in handling their cars the railroad companies will act with appropriate care, and that the usual signals of approach will be seasonably given. *Tabor v. Missouri Valley R. R. Co.*, 517.
4. A railroad corporation, authorized by its charter to take the lands of private parties for its road, does not exhaust its power by once locating its road; but, in case of necessity, may re-locate it and take private property for the purpose. *Mississippi and Tennessee R. R. Co. v. Devany*, 606.

See CARRIER; CARRIER OF PASSENGERS; MASTER AND SERVANT, 1, 4

RECORDING DEED

See CONVEYANCE, 2, 4, 5.

RENT.

See VENDOR AND PURCHASER.

REVENUE STAMP.

See STAMPS.

REWARD.

The selectmen of a town, under the authority of a general statute, offered a reward for the apprehension and conviction of a person guilty of the commission of a high crime. The plaintiff, claiming to have performed that service, brought action to recover the reward. *Held*, on demurrer, that the action was well brought. *Held*, also, that if two persons jointly performed the service they must be joined as plaintiffs. *Janerin v. Town of Exeter*, 185.

RIPARIAN RIGHTS.

1. The defendants, in pursuance of authority granted them by the legislature, built a dam which backed the water upon the ancient mill of plaintiff. *Held*, that defendants were liable for the injury occasioned. *Lee v. Pembroke Iron Company*, 59.
2. A legislative authority to do an act which will naturally result in damages to private property must be coupled with provisions for ascertaining and paying such damages in order to protect persons acting under such authority from liability at common law. *Id.*
3. The defendant, owning land on one side of a river, built a break-water to prevent the water's encroaching upon his land, which had the effect to throw the current over upon and wash away the plaintiff's lands opposite. *Held*, that the defendant was liable. *Gerrish v. Orough*, 165.

RIGHT OF WAY.

J, owning lands, on which was a strip called a street, but which was not laid out or dedicated as a public highway, conveyed the same to S., by a conveyance, in which the said strip was mentioned as a boundary and described as "St. Charles street." Subsequently S. conveyed a portion of such lands to the plaintiff, "with all the privileges and appurtenances thereunto belonging," referring to the so-called street, in the deed. The land so sold did not abut or front upon such street, nor was there a right of way by necessity over the land intermediate. *Held*, that the plaintiff did not acquire any right of way over the so-called street. *Dawson v. The St. Paul Fire Insurance Co.*, 109.

SABBATH DAY.

A person traveling on the Sabbath day to the house of a friend for pleasure is so far in violation of a law against traveling on the Sabbath day, unless for charity or necessity, that he cannot maintain an action against a town for injuries from a defect in the way. *Cratty v. City of Bangor*, 56.

SALE OF LAND.

See STATUTE OF FRAUD, 1, 3; COVENANT.

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SENTENCE.

See CRIMINAL LAW.

SHEEP KILLED BY DOGS.

See CONSTITUTIONAL LAW, 2, 2.

SHERIFF.

See BANKRUPTCY, 4.

SLAVES.

1. The defendant, in an action on a promissory note, alleged that the note was given for slaves taken by the plaintiff from Missouri to Arkansas, after the proclamation declaring that state in insurrection. *Held*, that the transaction was in violation of law, and that the note could not therefore be collected. *Carson v. Hunter*, 580.
2. By the abolition of slavery all contracts existing at the time relating to the sale of slaves were annulled. The sale of a slave being only the sale of his services for life, there was no difference between the right of an owner and of a hirer except in duration; obligations for the sale and also for the hirer of slaves were canceled by such abolition, and it is of no importance that the period of hire had terminated before the extinction of slavery, or that the contract was valid prior to that time. *Cormier v. Bienvenu*, 728.

SLANDER.

1. In an action of slander the defendant pleaded the general issue only, without notice of special matter. At the trial he offered evidence tending to prove the truth of the charge, for the purpose only of rebutting malice and mitigating damages. *Held*, that such evidence was admissible. *Huson v. Dale*, 66.
2. If the defendant wishes to rely on the truth of the charge as justification, he must plead it; but he may introduce evidence tending to prove its truth, to rebut malice, under the general issue and without notice. *Ib.*
3. In an action of slander, for calling plaintiff a "deserter," without alleging special damage, *held*, that as the offense alleged was only cognizable by a court-martial, the action could not be maintained. *Hollingsworth v. Shaw*, 411.
4. In an action of slander, if the alleged slanderous words charge an act to have been done in another state or country, which is not a crime by the common law, in order to make them actionable the pleading should show and the evidence establish its criminality by the laws of such state or country. *Bundy v. Hart*, 525.
5. In an action of slander, the words charged and the words proved must be substantially the same; that they both convey the same idea, will not be sufficient to sustain the action. *Ib.*

STAMPS.

1. Congress has no power to impose a stamp tax upon official bonds given to a state by its officers. *State v. Garton*, 815.

2. The failure to properly cancel United States revenue stamps affixed to an instrument does not render it invalid or incapable of being introduced in evidence. *D'Armond v. Dubose*, 718.

STATUTE OF FRAUDS.

1. If A. voluntarily conveys land to B., the latter having taken no measures to procure the conveyance, but accepting it, and verbally promising to hold the property in trust for C., the case falls within the provision of the statute of frauds requiring trusts to be expressed in writing, and a court of equity will not enforce the parol promise. *Lantry v. Lantry*, 810.
2. The plaintiff became surety on the note of an individual member of a firm, on the assurance of the firm that the money to be raised was for their use, and that they would pay it. The maker of the note became insolvent, and plaintiff paid the note, and brought suit against the remaining partner for the amount. *Held* that the engagement of the firm was in effect a promise to indemnify against their own obligation, and was, therefore, not void under the statute of frauds. *Garner v. Hudgins*, 520.
3. A. contracted with B. for the sale of a lot of land, the only written evidence of the contract being several receipts, signed by A. and his agent, acknowledging the receipt of certain sums of money from B. "in part payment for a house and lot," without describing the premises, or furnishing any data for ascertaining their locality. *Held*, that said writings were insufficient to take the case out of the statute of frauds, and that part performance of the agreement was also insufficient in this state. *McGuire v. Stevens*, 349.

See CONTRACTS, 3, 4.

STATUTE OF LIMITATION.

1. In an action on a promissory note given in Arkansas, the defendant alleged that the action was barred by the statute of limitation of that state; *held*, that the *lex fori* and not the *lex loci contractus* was to govern. *Carson v. Hunter*, 530.
2. After a cause of action has become barred by the statute of limitation, a defendant has a vested right to rely upon that statute as a defense, and neither a constitutional convention nor the legislature has power to divest the right, and revive the right to maintain the action. *Girdner v. Stephens*, 700.

STAY OF PROCEEDINGS.

See BANKRUPTCY.

SUNDAY.

See SABBATH DAY.

SURETIES.

1. A., B. and C. executed to the plaintiff, a bank, a joint and several bond, in the penalty of \$15,000, with a condition reciting that A. had become a member of a certain firm, rendering it probably necessary for him to use more funds in the business than he had at command, and which he proposed to borrow, and then proceeding thus: "Now the foregoing bond is to be in force, and

binding upon us, according to its terms, for the full amount of any loans and advances the said bank may make to said A., in connection with his said business, not to exceed in amount \$15,000, for which sum, by the foregoing bond, we acknowledge ourselves his sureties, and, in case of his failure to pay any such loans or advances as aforesaid, that the same shall and may be collected off us. Unless such loans and advances are made to said A. in his business aforesaid, upon the faith of this bond, the same is null and void," etc. The plaintiff alleged that, on the faith of this bond, and for the purposes therein specified, it loaned A. a sum of money on the checks of two other parties, indorsed by A., and that these checks were protested for non-payment. *Held*, that the bond was not an overture to guaranty by the sureties, but an actual undertaking.

Held, also, that B. and C. were sureties, and not guarantors, and, therefore, not entitled to notice of loans made on the credit of the bond, and of the default of the principal debtor. *McMillan v. The Bull's Head Bank*, 338.

2. The surety is bound with his principal as original guarantor, and his obligation to pay is equally absolute, irrespective of any notice of the principal's default, while a guarantor is an individual contractor, to answer only for the consequences of the default of the principal, and is therefore entitled to notice of such defaults. *Id.*

3. The parties were sureties on an official bond, upon which judgment had been recovered and paid by the plaintiff. In an action against the co-sureties for contribution, the latter alleged, in defense, that they had never been served with process, nor appeared in the action on the bond; that the plaintiff had appeared for them without authority, and suffered judgment to be entered, to defraud them; that he had, without their knowledge, entered into a special contract with the relators in that action to pay the judgment out of funds then in his hands, belonging to the principal on the bond, and, in consideration of such agreement, received an extension of one year's time on said judgment; that but for such extension of time the judgment could have been made out of the property of the principal. *Held*, that these facts did not constitute a defense to the action. *Baggott v. Mullen*, 351.

4. The defendants further alleged that they signed the bond out of which the liability arose at the request of the plaintiff. *Held*, that they were, nevertheless, liable to contribution. *Id.*

SURVIVORSHIP.

See WILL, 1, 2,

TAXATION.

See CONSTITUTIONAL LAW, 1; MUNICIPAL CORPORATION, 1; NATIONAL CURRENCY.

TAXES.

A tax duly assessed is not a debt within the meaning of that provision of the constitution which prohibits the legislature from passing any law impairing the obligation of a contract. *City of Augusta v. North*, 55.

TENANTS BY ENTIRETY.

See HUSBAND AND WIFE, 4

TEN HOUR LAW.

See CONTRACT, 1.

TRADE MARK.

The plaintiff gave to his place of business the name of "Antiquarian Book Store," by which name it became widely known. The defendant, having a rival store, adopted substantially the same name. *Held*, that the name could not be appropriated as a trade-mark. *Thoyndal v. Cohen*, 476. .

TRANSFER OF CAUSE.

1. An affidavit filed in conformity to the acts of congress, passed 27th July, 1866, and 2d March, 1867, relating to removal of causes from state to United States courts, cannot be traversed in the state court. *Stewart v. Outts*, 555.
2. The right of a defendant to a transfer of the cause is not defeated by the fact that his co-defendant is a resident of the same state with the plaintiff, provided a severance can be had, and the rights of the petitioner can be determined separately. *Id.*

TRESPASS.

A party entering upon land in good faith, under the belief that he has the title thereto, is not a naked trespasser, though the title be in fact in another; and he is entitled to all legal protection to his improvements and property placed upon the premises, given by the statute to parties in possession under color of title. *Mississippi & Tennessee R. R. Co. v. Devaney* 603.

See BELLIGERENT RIGHTS.

TRIAL BY JURY

See CONSTITUTIONAL LAW, 4

TRUST.

R. & Co., having a debt against B., attached certain property then in possession of H., by virtue of a deed of trust executed to him by B., in favor of S. & B., and, as appeared on the face of the instrument, to secure the payment of a \$40,000 note. It appeared, from an agreement bearing the same date, that the trust deed was intended to secure future advances as well as present liabilities; of which agreement the attaching creditor had no knowledge. The trustee gave a bond, and the right of property was tried. *Held* that the deed of trust was valid, although it did not show upon its face that it was to secure future advances, and that the possession of the trustee was good against the claim of R. & Co., whose demand was contracted subsequent to the recording of the deed. *Summers and Brannin v. Roos & Co.*, 653

See STATUTE OF FRAUDS, 1.

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UNCLE INFLUENCE.

See WILL, 5.

VENDOR'S LIEN.

The taking by the vendor of lands of the note of the purchaser, with a third person as surety thereon, is *prima facie* evidence of a waiver of the vendor's lien for the purchase-money, but it may be rebutted by satisfactory proof of an express agreement that the lien should be retained. *Penda v. Jones*, 669.

See DOWER.

VENDOR AND PURCHASER.

Where a person occupies real estate under a contract for the purchase of it, and the contract is ultimately carried into effect, the law will not imply a promise on his part to pay rent, and an action for use and occupation cannot be maintained against him in the absence of an express promise to pay rent. *Dennett v. Penobscot Fair Ground Co.*, 58.

VOLUNTARY CONVEYANCE.

See CONVEYANCE, 1.

VOLUNTARY GRANTEE.

See CONVEYANCE, 1.

VOTER.

See CONSTITUTIONAL LAW, 5.

WAR.

On the 14th of August, 1860, the plaintiff loaned the defendant, a citizen of Minnesota, the sum of \$17,000, upon a bond and mortgage on lands in that state, conditioned for the payment of the principal in five years, with interest, payable semi-annually. The plaintiff was, at the time, a resident of North Carolina, and so continued to the date of the action, and not there nor elsewhere engaged in the service of the United States, but during the whole period he had an agent in the State of Minnesota. In an action brought to foreclose the mortgage, *held*, that the plaintiff was entitled to recover the interest accruing on the bond during the rebellion and before maturity. *Dash v. Lambert*, 142.

WAREHOUSE RECEIPT.

A warehouseman, on application by the owner, issued by mistake, and at different dates, two warehouse receipts for the same goods, the first of which the owner assigned, for value, to F., and the other to the plaintiff. Afterward the warehouseman delivered the goods to the plaintiff on the second receipt. Whereupon, F. recovered the goods of plaintiff by replevin. On suit by plaintiff to recover of the warehouseman the value of the goods, *held*, that a warehouse receipt was not, technically, a negotiable instrument; that the assignee thereof occupied no better position than the assignor, and

that, therefore, the plaintiff could not recover. *Second National Bank v. Walbridge*, 408.

WILL.

1. A testator gave all his estate to his wife for life, with a direction that after her death it should be equally divided among his children or the *survivors of them*. One of the children died after the testator's death, but before that of the widow, leaving a child. *Held*, that no interest vested in the deceased child under the will, nor in the grandchild, she being neither one of the "children" nor "survivors." *Linton v. Boyd*, 569.
2. Words of survivorship in a will should be referred to the period for the payment or distribution of the subject-matter of the gift. *Ib.*
3. A condition in a will excluding from a share in the estate any heir of testator who "goes to law to break his will" is valid, both as to real and personal property. *Bradford v. Bradford*, 419.
4. Upon a breach of such a condition the legacy forfeited will pass to the general residuary legatee. *Ib.*
5. Where a person standing in a relation of confidence to a testator who was old and *in extremis*, prepared a will in his own favor, and procured a kinsman of his to witness the same, and caused the relatives and friends of the testator to leave the room while the will was read and executed, *held*, that the jury had a right to infer, from these facts and circumstances, fraud or undue influence, and that the *onus* was on the party propounding the paper to prove that it expressed the true will of the testator. *Harvey v. Sullens* 491

WORDS.

- "Children," see WILL, 1.
- "Common Law Jurisdiction," see NATURALIZATION.
- "Covenant to Build," see LESSOR AND LESSEE.]
- "Deserter," see SLANDER, 8.
- "Forwarders," see CARRIER, 8.
- "Guarantor," see SURETIES, 1.
- "Negotiable Instrument," see WAREHOUSE RECEIPT.
- "Survivor," see WILL, 1.
- "Voluntary Grantee," see CONVEYANCE, 1.



